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JURISDICTIONAL STATEMENT

This is an appeal from a jury verdict finding Appellant, Ms. Christy Jaco, guilty of the crime of Abuse of Child, a Class A Felony, in violation of Section 568.060 RSMo as more particularly set forth in the indictment. (L.F. 23). After the jury's guilty verdict, a penalty phase was conducted but the jury was unable to agree upon the appropriate sentence. (Tr. Vol. V. 1016:17) (L.F. 21). After the trial proceeding, a timely motion for new trial was filed on August 18, 2003. (L.F. 177). Said motion was overruled by court order dated September 16, 2003. (L.F. 22). Allocution was granted, and the Court entered its judgment of conviction and imposed sentence, sentencing Ms. Jaco to twenty (20) years in the Missouri Department of Corrections on this single count. (L.F. 208). A notice of appeal was timely filed on September 23, 2003, pursuant to Missouri Supreme Court Rules. (L.F. 210).

Ms. Jaco presents to this Court several issues on appeal. One of the issues presented is whether the newly amended Section 557.036, which was properly preserved throughout the trial process, is facially unconstitutional and therefore this Court possesses exclusive appellate jurisdiction in that this appeal involves the validity a statute of the State of Missouri. Mo. Const., art. V, § 3.

POINTS RELIED ON

I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT REFUSED TO ADMIT INTO EVIDENCE DEFENDANT'S EXHIBIT J, WHICH WAS THE ONLY PHOTOGRAPH TENDERED BY EITHER THE STATE OR MS. JACO DEMONSTRATING THE LINE OF SIGHT BETWEEN THE SOLE EYE-WITNESS AND THE LOCATION WHERE HE CLAIMED THE DEFENDANT WAS LOCATED, WITH THIS EVIDENTIARY EXCLUSION PREMISED UPON THE CHANGE IN APARTMENT FURNISHINGS/FURNITURE DEPICTED IN EXHIBIT J FROM THOSE EXISTING AT THE TIME ZACHARY BROOKS' INJURIES WERE SUSTAINED BECAUSE ANY DIFFERENCE IN FURNISHINGS/FURNITURE DEALS SOLELY WITH THE WEIGHT OF THE EVIDENCE AND NOT THE ADMISSIBILITY OF THE PHOTOGRAPH IN THAT SAID EXCLUSION BY THE TRIAL COURT DESTROYED DEFENDANT'S RIGHTS BESTOWED UPON HER BY THE FIFTH AMENDMENT AND FOURTEENTH AMENDMENT DUE PROCESS CLAUSES AND/OR THE SIXTH AMENDMENT CONFRONTATION CLAUSE OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 AND ARTICLE I, SECTION 18(a) OF THE MISSOURI CONSTITUTION BY COMPLETELY PRECLUDING DEFENDANT'S RIGHT TO CONFRONT HER ACCUSER AND PRESENT FAVORABLE EVIDENCE DEMONSTRATING THAT IT WAS IMPOSSIBLE FOR MR. ECKHOFF TO MAKE THE CLAIMED OBSERVATION THAT

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II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT REFUSED MS. JACO'S REQUEST TO CROSS-EXAMINE TWO (2) EXPERT WITNESSES ABOUT THEIR RESPECTIVE FAMILIARITY WITH SCIENTIFIC STUDIES INVOLVING SHAKEN BABY SYNDROME BECAUSE ANY SCIENTIFIC STUDY THAT IS GENERALLY ACCEPTED IN THE SCIENTIFIC COMMUNITY IS PROPER USE IN CROSS-EXAMINING EXPERT WITNESSES AND MAY BE ALSO RECEIVED AS PROPER PROFILE EVIDENCE IN THAT THE TRIAL COURT'S REFUSAL TO ALLOW THESE CROSS-EXAMINATIONS AND PRESENTATION OF EVIDENCE VIOLATED THE DEFENDANT'S RIGHTS BESTOWED UPON HER BY THE FIFTH AMENDMENT AND FOURTEENTH AMENDMENT DUE PROCESS CLAUSES AND/OR THE SIXTH AMENDMENT CONFRONTATION CLAUSE OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 AND ARTICLE I, SECTION 18(a) OF THE MISSOURI CONSTITUTION.

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State v. Candela, 929 S.W.2d 852 (Mo. Ct. App. 1996)

State v. Williams, 858 S.W.2d 796 (Mo. Ct. App. 1993)

State v. Sager, 600 S.W.2d 541 (Mo. Ct. App. 1980)

III. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT DENIED DEFENDANT'S MOTION TO DECLARE SECTION 557.036 OF THE MISSOURI STATUTES FACIALLY UNCONSTITUTIONAL AND PROCEEDING WITH A BIFURCATED TRIAL BECAUSE THE STATUTE PROVIDES NO PROCEDURAL SAFEGUARDS TO A DEFENDANT DURING THE PENALTY PHASE OF A BIFURCATED TRIAL INCLUDING, BUT NOT LIMITED TO, (A) DOES NOT IDENTIFY THE STANDARD OF PROOF THAT A JURY MUST EMPLOY IN REVIEWING EVIDENCE IN AGGRAVATION DURING THE PENALTY PHASE, (B) THE STATUTE DOES NOT REQUIRE THAT THE STATE PROVIDE NOTICE TO A DEFENDANT OF EVIDENCE IN AGGRAVATION THAT IT INTENDS TO PRESENT DURING THE PENALTY PHASE AND DOES NOT REQUIRE THAT THE STATE PROVIDE NOTICE TO A DEFENDANT OF THE WITNESSES THAT WILL TESTIFY DURING THE PENALTY PHASE, (C) THE STATUTE PERMITS THE INTRODUCTION OF CHARACTER EVIDENCE DESPITE THE FACT THAT THE DEFENDANT HAS NOT INJECTED THE ISSUE OF CHARACTER AT TRIAL, AND (D) THE MISSOURI LEGISLATURE ENCROACHED UPON AN AREA RESERVED TO THE JUDICIAL BRANCH AND DIRECTLY AFFECTED THE RIGHT TO A JURY TRIAL, AND IN ENACTING THIS TYPE OF PROCEDURE AND THE PROCEDURE EMPLOYED BY THE COURT IN BIFURCATING THE TRIAL INTO A GUILT PHASE AND PENALTY PHASE VIOLATED THE PROCEDURAL

PROTECTIONS GUARANTEED TO DEFENDANT BY THE FIFTH AMENDMENT, SIXTH AMENDMENT, EIGHTH AMENDMENT AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND/OR ARTICLE I, SECTION 10, ARTICLE I, SECTION 21, AND THE CONSTITUTIONAL SEPARATION OF POWERS PROVIDED IN ARTICLE II, SECTION 1, AND ARTICLE V, SECTION 5 OF THE MISSOURI CONSTITUTION.

Mo. Const., art. II, § 1

Mo. Const., art. V, § 5

V.A.M.S., § 1.160

V.A.M.S., § 557.036

Ring v. Arizona, 536 U.S. 584 (2002)

Apprendi v. New Jersey, 530 U.S. 466 (2000)

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IV. THE TRIAL COURT COMMITTED PREJUDICIAL REVERSIBLE ERROR IN BIFURCATING THE TRIAL PROCEEDING INTO A GUILT PHASE AND A PENALTY PHASE IN RELIANCE UPON SECTION 557.036 BECAUSE THE AMENDMENT TO SECTION 557.036 WAS NOT PROCEDURAL IN NATURE AND ERROR WAS PRESENT IN THAT SECTION 1.160 MANDATES, IN PART, THAT A PENDING CRIMINAL TRIAL SHALL PROCEED AS THOUGH NO STATUTORY AMENDMENT TOOK PLACE WHEN THE AMENDMENT DOES NOT INVOLVE PROCEDURAL CHANGES OR LESSENS THE APPLICABLE PUNISHMENT AND THE TRIAL COURT'S PROCEEDING IN ACCORD WITH THE NEWLY ENACTED SECTION 557.036 VIOLATED THE PROTECTIONS GUARANTEED TO DEFENDANT BY THE FIFTH AMENDMENT, SIXTH AMENDMENT, EIGHTH AMENDMENT AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND/OR ARTICLE I, SECTION 10, ARTICLE I, SECTION 21 OF THE MISSOURI CONSTITUTION.

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V.A.M.R., 28.02

Ring v. Arizona, 536 U.S. 584 (2002)

Apprendi v. New Jersey, 530 U.S. 466 (2000)

State v. Debler, 856 S.W.2d 641 (Mo. 1993)

STATEMENT OF FACTS

It was uncontested at trial that Zachary Brooks, Christy's Jaco's one-year old son, suffered severe injuries on November 21, 2001, that were consistent with Shaken Baby Syndrome, and that these same injuries ultimately resulted in his death. (Tr. Vol. I 219: 7-20). However, what was hotly contested at trial was who was responsible for causing these injuries; Christy Jaco or Matthew Eckhoff, Ms. Jaco's live-in boyfriend.

Zachary Brooks was born on October 1, 2000, and was the son of Jeremy Brooks and Christy Jaco. (Tr. Vol. III 619:4, 12-13; 637:3-10). During Christy's pregnancy, Christy and Jeremy rented a small house for their new family. (Tr. Vol. IV 771:1-3). The couple, unhappy with their living situation following Zachary's birth, then abandoned their small home and moved in with some friends to a larger apartment. (Tr. Vol. IV 771:8-12). Unfortunately, as it happens with young parents, their relationship deteriorated. (Tr. Vol. IV 771:15).

Following this break-up and immediately prior to Zachary's first Thanksgiving, Jeremy, with his mother, Teresa Brooks's assistance, and without any prior court approval took custody and control of Zachary away from Christy. (Tr. Vol. III 639:2-6; Vol. IV 772:19). Christy fervently sought the return of her son yet the Brooks family refused her requests and pleas. (Tr. Vol. IV 772:11-21). As a direct result of their consistent refusal, Christy sought and received the assistance of the courts and obtained an order of protection in order to regain custody of her son. (Tr. Vol. III 639:14-16; Vol. IV 772:24).

Fortunately, but only after emotions calmed from this custody battle, Christy and Jeremy discussed Zachary's welfare and agreed that free access to the child by both families

would be in his best interests. (Tr. Vol. III 619:16-22). This voluntary agreement resulted in Jeremy and/or the Brooks family having routine access to Zachary almost each and every weekend and whenever Jeremy was otherwise available or desired to spend time with his son. (Tr. Vol. III 620:3).

After Christy's breakup with Jeremy, she moved from their apartment and returned to the home of her parents, Melvin Jaco and Lois Jaco. (Tr. Vol. III 640:3). Zachary and Christy lived with Mr. and Mrs. Jaco for several months until Christy found an apartment at _717 Jackson Street. (Tr. Vol. III 644:9-10). It was at this apartment complex that she would eventually meet Mr. Matthew Eckhoff, who at that time resided in a downstairs apartment with his wife, Angela, and his two (2) sons, Devon and Noah. (Tr. Vol. II 326:5).

Prior to Christy's moving into that apartment complex and throughout the time that she lived there, Christy frequently took Zachary to various doctors for checkups, colds and other concerns. (Tr. Vol. III 647:2). These doctor visits would occur approximately every month and continued throughout Zachary's entire life. (Tr. Vol. III 631:21-24; Vol. III 648:2-8). In fact, and as an example, the day prior to the injuries in question, Christy took Zachary to the hospital because of a cold. (Tr. Vol. II 340:10).

Additionally, throughout this entire time period Mrs. Lois Jaco worked at Parkland Health Center where she managed the laboratory. (Tr. Vol. III 637:12-25; 638:1). Christy also possessed some medical training and worked as a certified nurse assistant at Farmington Manor. (Tr. Vol. II 344:18-22). Christy would often visit with her co-workers, her mother and her mother's co-workers with Zachary in tow. (Tr. Vol. III 648-18-22). Several individuals

indicated that they had the opportunity to observe Zachary's demeanor and well-being during these visits and described Zachary as an extremely happy child. (Tr. Vol. IV 719:25; Vol. IV 732:12).

In accord with Christy and Jeremy's agreement, both the Jaco family and the Brooks family enjoyed substantial time with Zachary. (Tr. Vol. III 619:25). Prior to Christy's moving in with Matt Eckhoff, Jeremy's mother, Mrs. Teresa Brooks' primary concern was that Zachary continue to receive the proper care involving hygiene, feeding etcetera. (Tr. Vol. III 627:2-9). In fact, during this same period of time, Mrs. Brooks described this concern as hoping that Christy could "continue" to provide the necessary care that Zachary needed. (Tr. Vol. III, 627:6-7). Mrs. Lois Jaco, as a grandmother, possessed the same concern and believed that young mothers may make mistakes and that is only to be expected, but that she never observed any mistake that harmed her grandson. (Tr. Vol. III 646:19-23). In fact, Mrs. Jaco characterized Christy's mothering as somewhat overprotective and would run Zachary to the doctor for every little cold. (Tr. Vol. III 648:2-8).

These grandmother's concerns changed dramatically after Christy began living with Mr. Eckhoff and bruising was first observed. (Tr. Vol. III 629:12-14).

In July, Matt Eckhoff separated from his wife, Angela, with Angela leaving the home and Devon and Noah, their two (2) boys remaining with Mr. Eckhoff. (Tr. Vol. III 471:2-12). Apparently, immediately after leaving the home Angela sought and received some form of treatment for her psychiatric issues. (Tr. Vol. III 470:21).

Christy and Zachary, shortly after Angela's departure, moved into Mr. Eckhoff's

apartment with his two sons. (Tr. Vol. III 470:24). Only after Zachary and Christy began living with Mr. Eckhoff did the Brooks family and the Jaco family begin to notice bruises frequently appearing on Zachary's body. (Tr. Vol. III 629:12). In fact, Tammy Benson, a day care provider, noticed the bruising and placed a call to Mrs. Margaret Politte, Mr. Eckhoff's mother. (Tr. Vol. III 581:6-9). This type of bruising was Christy's primary concern prior to Ms. Benson's telephone call. (Tr. Vol. III 654:3-20). In fact, Christy was in the process of changing doctors because she requested that the bruising be investigated on several occasions, with each request being refused. (Tr. Vol. III 655:7-11). However, the primary care doctor at that time, Dr. Karl Killion could not recall whether Christy's requests were made or not because his record-keeping would not reflect a request that was refused. (Tr. Vol. III 614:5).

Nonetheless, another hospital visit to Parkland Health Center followed Ms. Benson's telephone call in order to investigate the bruising further. (Tr. Vol. IV 720:4-5). At this hospital visit, certain blood tests were performed in order to rule out a blood disorder. (Tr. Vol. IV. 720:23-25). The initial blood test returned normal results. (Tr. Vol. III 597:4-5). Therefore a review by a specialist was necessary and an appointment was scheduled to occur on November 27, 2004, several days following Zachary's death. (Tr. Vol. III 598: 6-14; Vol. III 654:20).

At that same Parkland hospital visit, Ms. Pamela Miller, one of the laboratory technicians involved in the blood testing observed bruising along Zachary's back. (Tr. Vol. IV 721:2). This bruising was discussed between Ms. Miller and Ms. Kenya Armstead, who was also involved in the testing. (Tr. Vol. IV 721:16-17). It was their belief that the bruising

appeared to be some form of hand/finger marks and, in fact, relying upon this belief Ms. Miller compared her hand to the bruising pattern and found that if she were to stretch her hand to the greatest capacity the pattern was consistent with fingertip, hand-squeezing bruising, and with Ms. Miller's stretched hand she could fit the pattern. (Tr. Vol. IV 722:9-21). At trial, Ms. Miller's hand and Christy's hand were compared before the jury and demonstrated that Christy's hand was considerably smaller than Ms. Miller's hand. (Tr. Vol. IV 726:13-19).

On November 21, 2001, the day prior to Christy's first Thanksgiving with Zachary, which would be the first she would spend with her son because of the prior custody dispute with the Brooks family, Christy spoke with Mrs. Lois Jaco about the feast scheduled for the following day. (Tr. Vol. III 656:9-13). It was decided that Christy would prepare a potato dish and that Mr. Melvin Jaco, Christy's father, and Kasey Chapman, Christy's niece, would bring the potatoes to Christy that evening when he arrived at her apartment to take her to work. (Tr. Vol. IV. 683:3-7).

Matt Eckhoff arrived home from work that same November 21st day at approximately 4:00 p.m. and found that Christy and Zachary were not home at that time. (Tr. Vol. II 341:2-11). While Mr. Eckhoff was at work, he was informed that Angela, his wife, that he was served with petition for dissolution. (Tr. Vol. II 342:14). Mr. Eckhoff and Christy discussed the dissolution papers and, surprisingly, it was Mr. Eckhoff's impression that Christy was unhappy about Mr. Eckhoff's divorce, despite Mrs. Angela Eckhoff moving out of the apartment and Christy's and Mr. Eckhoff's living arrangement and plans to marry in the future. (Tr. Vol. II 342:22-23; Vol. II 376:21).

At approximately 6:00 p.m. on this same day, Angela Eckhoff arrived at the apartment to retrieve the Eckhoff boys, Devon and Noah, for the Thanksgiving holiday. (Tr. Vol. II 343:4-7). Mr. Eckhoff took the boys outside to Angela's vehicle and discussed, among other things, the dissolution papers that he received. (Tr. Vol. II 343:10-12). Angela then departed with the boys and Mr. Eckhoff returned to the apartment. (Tr. Vol. II 343: 13-16). Mr. Eckhoff, Christy and Zachary then watched television together until Mrs. Margaret Politte, Mr. Eckhoff's mother, arrived at the apartment in order to borrow a tool. (Tr. Vol. II 344:1-8). A short visit followed and Mrs. Eckhoff left the apartment shortly before 10:00 p.m. (Tr. Vol. II 344:13-14). Once again, Mr. Eckhoff, Christy and Zachary watched television in the living room and did so until it was time for Christy to get ready for work at Farmington Manor. (Tr. Vol. II 380:5-10).

At the time Christy begins to prepare for work and what allegedly occurs thereafter involves the primary issues before this Court.

Christy went into another room and changed into her work uniform (Tr. Vol. II 383:4); Mr. Eckhoff left the couch, paced around the living room area and went into the kitchen (Tr. Vol. II 383:13-15; Vol. II 385:8); Zachary remained on the couch (Tr. Vol. II 384:24). Christy then returned to the couch and sat with Zachary (Tr. Vol. II 385:22), with Mr. Eckhoff remaining in the kitchen area leaning against the sink next to the refrigerator (Tr. Vol. II 387:21-24; Vol. II 388:1; Vol. II 389:1); just leaning against the sink and not performing any household chores, just leaning against the sink, doing nothing but leaning, for an extended period of time. (Tr. Vol. II 386:4-11; 389:13-20). Zachary was crying and fussy while Christy

was preparing for work and while Mr. Eckhoff was pacing around the apartment or leaning against the kitchen sink. (Tr. Vol. II 387:21-24).

Mr. Eckhoff claims that he then observed Christy return to the couch next to Zachary; however, nothing out of the ordinary occurred and Zachary acted in the same manner has he had through the day. (Tr. Vol. II 391:3). Mr. Eckhoff hears Zachary become fussy. (Tr. Vol. II 396: 24). Mr. Eckhoff then states that Christy, while standing between the couch and the coffee table near the middle of that same table in the general area of her tennis shoes (L.F. 108) (Tr. Vol. II 393:7-25: 394:1-2; Vol. II 395:25), picks Zachary up off of the couch from her left side. (Tr. Vol. II 391:24-25). He then states that Christy held Zachary, with arms extended at shoulder height, and shook Zachary back and forth. (Vol. II 395:9-14). Mr. Eckhoff further indicated that when this shaking occurred Christy was facing the bedroom and therefore the outstretched arms would be extended away from the window and towards the bedroom and he viewed Christy's right side. (Vol. II 395:3; Vol. II 401:16). He also acknowledged that his prior statement to the prosecuting attorney's investigator, Mike Keown, was that while Christy shook this child she also held her finger to her mouth and said be quiet. (Tr. Vol. II 400:11-21). Christy then, as recalled by Mr. Eckhoff, takes Zachary into Zachary's bedroom. (Tr. Vol. II 347:3-4). Mr. Eckhoff then hears three thumps. (Tr. Vol. II 347:9) Christy leaves the room and tells Mr. Eckhoff that he is finally asleep. (Tr. Vol. II 348:3). Mr. Eckhoff now leaves the kitchen area. (Tr. Vol. II 348:25: 349:1). He does not call 911. (Tr. Vol. II 348:25: 349:1). He does not call Division of Family Services. (Tr. Vol. II 348:25: 349:1). In fact, no calls are made at this point and following Christy's departure for work he

lays down on the couch and begins to read a book. (Tr. Vol. II 348:25: 349:1).

Mr. Jaco, Christy's father, arrives with his granddaughter, Kasey Chapman, to take Christy to work at approximately 10:15 p.m. (Tr. Vol. IV 682:15-16). Kasey enters the apartment and delivers the potatoes that Christy and her mother Lois discussed earlier that day by handing the potatoes to Christy who then took them in the kitchen and placed them on the kitchen counter. (Tr. Vol. IV 746:25; Vol. IV 748:18).

Mr. Jaco, Christy and Kasey left the apartment. (Tr. Vol. IV 684:14). Christy arrived at work and clocked in at 10:58 p.m. (Tr. Vol. IV 767:18-23). Mr. Jaco and Kasey then return to Mr. Jaco's home. (Tr. Vol. IV 685:20-23). Christy's demeanor and temperament prior to work were normal and cheerful and that she was excited about the holiday on the next day, and she did not appear frustrated or angry. (Tr. Vol. IV 684:16; Vol. IV 685:11-12).

Mr. Eckhoff, with Zachary in his bedroom, lays down on the couch and begins to read. (Tr. Vol. II 348:25-349:1). There was much conflict in the record as to the time that he began to read and the observations he claims to have made later. (Tr. Vol. II 349:8-9; Vol. II 418:1-10). Nonetheless, at some point in time Mr. Eckhoff claims to hear Zachary cough. (Tr. Vol. II 349:25). Mr. Eckhoff then states that he enters Zachary's room and finds him seizing and struggling for breath. (Tr. Vol. II 350:7-10). Mr. Eckhoff claims that he then shakes Zachary (Tr. Vol. II 438:10-16; Vol. II 439:1-5) for a few "moments" which he defines as minutes (Tr. Vol. II 440:6-23), he pats him on the back (Tr. Vol. II 350:22-23), puts him to the ground and hears a popping sound as Zachary's head hits the floor (Tr. Vol. II 442:3-5), and then attempts to give Zachary mouth-to-mouth resuscitation. (Tr. Vol. II 351:21-25). According to Mr.

Eckhoff's testimony, these actions all take place in a twenty

(20) minute time span. (Tr. Vol. II 420:21-22).

Mr. Eckhoff then telephones Christy at her work informing her of Zachary's distress. (Tr. Vol. II 353:14-20). She immediately tells him to call 911. (Tr. Vol. II 353: 22-23). Mr. Eckhoff contacted 911 on November 22, 2001 at 12:49 a.m., which is approximately two and one-half (2 ½) hours after Christy left for work. (Tr. Vol. II 172:15-16). Christy then contacts Mr. and Mrs. Jaco and informs them of the situation. (Tr. Vol. IV 686:17-25; 687:1). Christy clocked out from work at 12:52. (Tr. Vol. IV 767:23).

Eventually an ambulance arrives at the household. (Tr. Vol. II 354:17). Zachary is examined and then taken to Parkland Health Center. (Tr. Vol. II 354:19-21). Mr. Jaco travels back to Farmington Manor and takes Christy to Parkland Health Center Emergency Room. (Tr. Vol. IV 686:17-25; 687:1). Mr. Jaco and Christy arrived before the ambulance. (Tr. Vol. IV 687:11). Mrs. Lois Jaco and Kasey Chapman arrived at Parkland after the ambulance. (Tr. Vol. IV 687:4).

While at Parkland, and at one point in time, Mr. Eckhoff testified that he and Christy were outside smoking a cigarette discussing Zachary's condition and claimed that Christy indicated they may be investigated. (Tr. Vol. II 356:6-9). Kasey Chapman testified that she was present with them (Tr. Vol. IV 752:4-6; Vol. IV 688:2-6). In fact, Kasey remembered a statement made by Mr. Eckhoff indicating that it was all his fault, which was denied admission at trial and an appropriate offer of proof made. (Tr. Vol. IV 752:20-23). However, Mr. Eckhoff denied ever making that statement and denied that Kasey was outside with them. (Tr.

Vol. IV 423:16-23).

Unfortunately, it is discovered at Parkland that Zachary suffered severe injuries and that a helicopter transport to St. Louis was required. (Tr. Vol. IV 782:23).

Cardinal Glennon, the St. Louis transfer hospital, found that Zachary's situation was extreme and required that the medical staff conduct a brain death test. (Tr. Vol. I 183:6-11). Both Christy and Jeremy are informed that the test was met with negative and dire results. (Tr. Vol. IV 784:5-25).

Detective Mark Kennedy is then contacted and he traveled to the hospital as a courtesy to the Park Hills Police Department to conduct an investigation. (Tr. Vol. II 263:3-19; 264:1-10). Detective Kennedy met with Christy and the medical staff and discussed the situation. (Tr. Vol. II 264:13; 265:11). He stated that based upon his experience as a police officer that Christy's demeanor, withdrawn and blank-faced, would be consistent with an individual in shock. (Tr. Vol. II 270:12-23). Some medical personnel classified Christy's demeanor as withdrawn and blank-faced. (Tr. Vol. II 243:10; 256:17).

Mr. Eckhoff is then taken into custody by the Park Hills Police Department, specifically by Detective Doug Bowles and Detective Rigel. (Tr. Vol. II 276:14-16). Mr. Eckhoff is asked for consent to search the apartment and consent was then given. (Tr. Vol. II 276:14-16). He is also asked to provide a statement, which he does. (Tr. Vol. II 282:14). This statement is then videotaped. (Tr. Vol. II 282:17-21). Mr. Eckhoff is then re-interviewed. (Tr. Vol. II 282:17-21). Then another videotape statement is obtained. (Tr. Vol. II 282:17-21). In none of these four (4) statements does Mr. Eckhoff claim that he observed Christy shake

Zachary, but rather the only shaking that occurred was when he shook Zachary to wake him. (Tr. Vol. II 300:2; Vol. II 302:2; Vol. II 303: 9; Vol. II 304:24; Vol. II 306:13; Vol. II 430:18-19; Vol. II 434:22; Vol. II 436:25).

After obtaining these statements, Detective Bowles traveled to Cardinal Glennon for the first time to speak with the medical staff. (Tr. Vol. II 282:17-21; Vol. II 283:6). The medical staff, including Dr. Martin Keller, informed these officers that Zachary's injuries were consistent with Shaken Baby Syndrome and therefore required rapid acceleration/deceleration and/or blunt trauma. (Tr. Vol. II 284:9-12). Moreover, that the history provided by Mr. Eckhoff was not accurate based upon the scientific findings. (Tr. Vol. II 306:18-25).

Detective Bowles and Lt. Rigel returned to Park Hills and questioned Mr. Eckhoff once again. (Tr. Vol. II 306:7). In fact, Mr. Eckhoff is informed by the officers that they do not believe him because the doctors indicated that violently shaking and/or blunt trauma was required to cause the severity of these injuries. (Tr. Vol. II 306:14-18). Only after being informed of and provided with this fact, and his learning that the officers disbelieved him while he is designated as a suspect in their custody, does Mr. Eckhoff then claim that a shaking of Zachary occurred and that Christy did shake Zachary. (Tr. 306:19-25).

In reliance upon Mr. Eckhoff's consent, the investigating officers entered the apartment and took several photographs, which were taken from various positions and angles. (Tr. Vol. II 278:13-14). Unfortunately, not one of these photographs demonstrated the line of sight from Mr. Eckhoff's location in the kitchen to Ms. Jaco's location in the living room; and most importantly not one from the precise location where Mr. Eckhoff claims that Christy was

located when he claims to observed the shaking. (L.F. 105-124). In fact, one photograph depicting a view from the living room to the kitchen was either taken on the opposite side of the coffee table from where Mr. Eckhoff claims Christy was located or the photograph was taken while straddling that same table. (L.F. 109) (Tr. Vol. II 315:3-11).

With this new information from Mr. Eckhoff in hand, these officers released Mr. Eckhoff and referred the case to the prosecuting attorney. (Tr. Vol. II 285:4-6). A warrant was subsequently issued for Christy's arrest. (Tr. Vol. II 16-20).

Christy was taken into custody at Cardinal Glennon and transported to the City of St. Louis Police Department. (Tr. Vol. II 286:3). There she was questioned for the first time following her arrest. (Tr. Vol. II 286:8). Christy was then transported to the Park Hills Police Department where she was questioned a second time. (Tr. Vol. II 292:3; 292:21-24).

An autopsy was performed by Dr. Jane Turner from the City of St. Louis Medical Examiner's office. (Tr. Vol. I 203:11). Dr. Turner's examination concluded that the Zachary's weight after the harvesting of organs was twenty-five (25) pounds. (Tr. Vol. I 234:12). Thus, Zachary's weight at the time of his death, and prior to the harvesting, was approximately twenty-seven (27) pounds. (Tr. Vol. I 235:3-8). Her conclusion was that Zachary's death was caused by a closed head injury from injuries that were consistent with those suffered in a rapid acceleration/deceleration and/or blunt trauma; in other words, Shaken Baby Syndrome. (Tr. Vol. I 218:7; Vol. I 219:7-20).

Mr. Eckhoff and Christy, obviously, in light of the events, split as a couple, vacated the apartment and returned the apartment to their landlord's possession and control. (Tr. Vol. II

324:17-24). This apartment was then rented to another tenant with the new tenant's furniture put in place. (Tr. Vol. IV 688:21-25). But the layout/floor plan remained the same throughout all relevant times. (Tr. Vol. IV 690:2-4).

While the case was pending in the Associate Circuit Court, the St. Francois County Prosecuting Attorney's Office elected to present the matter to the Grand Jury and an indictment was returned. (L.F. 23). Christy was once again arrested and was once again required to post bond securing her release. (L.F. 1). The formal indictment was returned only after the apartment was surrendered by Mr. Eckhoff and Christy. (L.F. 1).

Prior to going forward with trial, Christy, by counsel, took the depositions of certain individuals, including Dr. Jane Turner. (L.F. 133). At Dr. Turner's deposition she testified about her expertise and knowledge of scientific studies, statistics and evidence that she acquired as a result of her profession and expertise. (L.F. 164-167).

Also, and prior to trial, Christy, her counsel and Mr. Robert Thomure, an investigator, contacted the new tenant of the apartment in question. (Tr. Vol. IV 692:6-11). This tenant granted access to the apartment for the purpose of taking photographs, measurements and video of the apartment layout. (Tr. Vol. IV 692:6-11).

The matter was transferred from St. Francois County to Ste. Genevieve County upon motion and request by Christy and her counsel. (L.F. 2; 28-29). Trial began on July 28, 2003, and concluded four days thereafter. (L.F. 11-12).

Prior to trial, a motion to declare Section 557.036 unconstitutional was filed on Christy's behalf. (L.F. 157-160). This motion was denied by the trial court. (Tr. Vol. I 16:6).

Another motion was filed on Christy's behalf requesting that the Court allow the introduction of scientific studies, statistics and evidence involving Shaken Baby Syndrome. (L.F. 164-167). This request was also denied and preserved by the defense at the appropriate time by making an offer of proof during both Dr. Martin Keller's testimony and Dr. Turner's testimony. (Tr. Vol. I 7:6-12; Vol. I 191:18-25; 192:1-11; Vol. I 237:2-25; 238:1-25; Vol. II 239:1-12).

Another motion was presented requesting the admission of the apartment photographs taken by Mr. Thomure after Christy and Mr. Eckhoff surrendered the apartment. (L.F. 161-163). This motion was taken originally under submission but was ultimately denied by the trial court during trial based upon the fact that the furnishings were different from those present at the time Mr. Eckhoff and Christy resided there. (Tr. Vol. IV 690:14-20). There was no argument presented by either Christy or the State that the floor plan or physical layout of the apartment was different in either the State's photographs or the proposed photographs. (Tr. Vol. IV 688:11-25; 689:1-25; 690:1-25; 691:1-12). The objection to the exclusion of this evidence was tendered and an offer of proof made. (Tr. Vol. IV 691:16-25; 692:1-11).

During deliberations, the jury requested the apartment photographs for their review in determining Christy's innocence or guilt; these photographs did not include Exhibit J, which was offered by Christy but refused by the trial court. (L.F. 170) (Tr. Vol. IV 861:21-25; 862:1-6).

After several days of trial, the jury returned a verdict of guilty. (Tr. Vol. IV 862:15-22). The matter proceeded to the second phase/punishment phase as required by the newly enacted Section 557.036. (Tr. Vol. V 873:8-16). Once again, Christy by counsel objected to the

statute and the bifurcation of this cause, which was, once again, denied by the court. (Tr. Vol. V 883:18-24).

As and for the penalty phase, the State tendered instruction number eleven (11), which provided that:

> At this stage of the trial, we will proceed as follows:
>
> First, the attorneys will have an opportunity to make a statement outlining additional evidence to be presented. Such evidence may then be introduced. After that, the Court will provide you with additional instructions.
>
> Then the attorneys may make their arguments.
>
> You will then go to the jury room, deliberate, and arrive at your verdict.

(L.F. 173).

Also, tendered was Instruction Number Twelve (12) which provided:

> The law applicable to this stage of the trial is stated in these instructions and Instruction Nos. 1 and 2 that the Court read to you in the first stage of the trial.
>
> In assessing and declaring the defendant's punishment, you should consider the evidence presented to you in this case, the argument of counsel, and the instructions of the Court. You may consider the evidence presented in either stage of the trial.

You will be provided with forms of verdict for your convenience.

You cannot return any verdict as the verdict of the jury unless all twelve jurors agree to it, but it should be signed by your foreperson alone.

When you have concluded your deliberations, you will complete the applicable forms to which you unanimously agree and return them together with all unused forms and the written instructions of the Court.

(L.F. 174).

Also, the State presented Instruction Number Thirteen (13) and also was given to the jury and stated that:

The attorneys will now have the opportunity of arguing the case to you regarding the punishment to be imposed. Their arguments are not evidence.

You will bear in mid that it is your duty to be governed by the evidence as you remember it, the reasonable inferences that you believe should be drawn therefrom, and the law as given in the instructions.

It is your duty, and yours alone, to render such verdict under the law and the evidence concerning the punishment to be

imposed as in your reason and conscience is true and just.

The state's attorney must open the argument. The defendant's attorney may then argue the case. The state's attorney may then reply. No further argument is permitted by either side.

(L.F. 175).

As a result of the bifurcation and the instructions in question, Christy offered to the Court a proposed non-MAI instruction that was modeled after 313.31A and 313.44A, which read as follows:

You must unanimously find beyond a reasonable doubt that aggravating circumstances exists, taken as a whole, to impose punishment in excess of ten (10) years in the Department of Corrections. If each juror finds facts and circumstances in aggravation of punishment that are sufficient to increase defendant's sentence from the ten (10) year [sic] years, then you may assess a sentence not to exceed thirty (30) years or life imprisonment.

You must also determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh the facts and circumstances in aggravation of punishment. In deciding this question, you may consider all of

> the evidence presented in both the guilt and the punishment stages of trial.
>
> If you do not unanimously find beyond a reasonable doubt from the evidence that the facts and circumstances in aggravation of punishment warrant an increase from the ten (10) year sentence of punishment, or if you believe that the facts or circumstances in mitigation sufficiently outweigh the facts and circumstances in aggravation of punishment, you must return a verdict fixing defendant's punishment at ten (10) in the Department of Corrections.

(L.F. 200). This instruction was refused by the trial court. (Tr. Vol. V 883:18-24; 884:2-6). Additionally, a timely objection was lodged by the defense to each of the penalty phase instructions tendered by the State. (Tr. Vol. V 884:7-21).

The jury was unable to agree upon a sentence following this second phase. (Tr. Vol. V 1016:17-18).

A timely motion for new trial was filed but denied by the trial court. (L.F. 177-207). Sentencing took place on September 16, 2003, and the trial court, after reviewing the applicable pre-sentence investigation report, ordered that Christy receive a sentence of twenty (20) years in the Missouri Department of Corrections. (L.F. 208-209).

This appeal follows. (L.F. 210).

ARGUMENT

I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT REFUSED TO ADMIT INTO EVIDENCE DEFENDANT'S EXHIBIT J, WHICH WAS THE ONLY PHOTOGRAPH TENDERED BY EITHER THE STATE OR MS. JACO DEMONSTRATING THE SOLE EYE-WITNESS' VANTAGE POINT, WITH THIS EVIDENTIARY EXCLUSION PREMISED UPON THE CHANGE IN APARTMENT FURNISHINGS/FURNITURE DEPICTED IN EXHIBIT J FROM THOSE EXISTING AT THE TIME ZACHARY BROOKS' INJURIES WERE SUSTAINED BECAUSE ANY DIFFERENCE IN FURNISHINGS/FURNITURE DEALS SOLELY WITH THE WEIGHT OF THE EVIDENCE AND NOT THE ADMISSIBILITY OF THE PHOTOGRAPH IN THAT SAID EXCLUSION BY THE TRIAL COURT DESTROYED DEFENDANT'S RIGHTS BESTOWED UPON HER BY THE FIFTH AMENDMENT AND FOURTEENTH AMENDMENT DUE PROCESS CLAUSES AND/OR THE SIXTH AMENDMENT CONFRONTATION CLAUSE OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 AND ARTICLE I, SECTION 18(a) OF THE MISSOURI CONSTITUTION BY COMPLETELY PRECLUDING DEFENDANT'S RIGHT TO CONFRONT HER ACCUSER AND PRESENT FAVORABLE EVIDENCE DEMONSTRATING THAT IT WAS IMPOSSIBLE FOR MR. ECKHOFF TO MAKE THE CLAIMED OBSERVATION THAT DEFENDANT COMMITTED THE ACT CHARGED AND THEREFORE THIS EXCLUSION OF EVIDENCE

RESULTED IN CONSTITUTIONAL ERROR AND/OR WAS AN ABUSE OF DISCRETION.

The first issue presented by Ms. Jaco is whether the trial court committed reversible error when it refused to admit Defendant's Exhibit J, which was the only photograph depicting the sole eye-witness' true line of sight. (App. A1). Several photographs of the apartment were taken by the investigating officers and included those offered by the State and admitted into evidence where those photographs were taken shortly following Zachary Brooks sustaining his injuries. (L.F. 105-124).

However, not one of the State's photographs depicted Mr. Eckhoff's line of sight from where he claimed Ms. Jaco was located to where he claimed he was leaning, living room couch to kitchen-sink, but rather the photographs demonstrated a view from other and different locations in the living-room area to kitchen. (L.F. 105-124) (Tr. Vol. II 315:3-11).

Because no photograph was taken that actually shows the witness' line of sight and his inability/ability to make the claimed observation, Ms. Jaco spoke with the new apartment tenant and was given permission to take photographs, which included Exhibit J. (App. A1) (Vol. IV 692:6-11). When Exhibit J was offered into evidence the trial court refused its admission and presentation to the jury solely because the furnishings in the apartment had changed. (Tr. Vol. IV 690:14-20) However, the floor plan remained consistent in all photographs. (Tr. Vol. IV 688:11-25; 689:1-25; 690:1-25; 691:1-12). It is Ms. Jaco's contention that any change in furnishings simply involves the weight the evidence should receive and any change in furniture should not be relied upon by a trial court as a basis for inadmissibility. It must be noted that

no party argued that the floor plan of the apartment, including the wall and sink in question, were different in either photograph, and if such an argument were tendered it would be factually inaccurate. (Tr. Vol. IV 688:11-25; 689:1-25; 690:1-25; 691:1-12). Exhibit J was a critical component in Ms. Jaco's defense in that it proves that, when considering the already admitted State's photographs, Matthew Eckhoff could not have made his claimed observation and therefore this claimed observation was false because his view would have been obstructed by a wall. (App. A1).

The trial court's refusal to receive the photograph into evidence destroyed Ms. Jaco's right to confront, cross-examine, contradict and impeach the credibility of her sole accuser and the State's chief witness, Matthew Eckhoff, and to present evidence in her own behalf which rights are guaranteed to her by the United States Constitution and the Missouri Constitution.

Standard of Review

Christy Jaco acknowledges that the normal standard of review employed involving a trial court's ruling on evidence, including the admission of a photograph or refusing to admit a photograph, is one of abuse of discretion. State v. Williams, 849 S.W.2d 575, 580 (Mo. Ct. App. 1993). An abuse of discretion occurs when the trial court's ruling is "clearly against the logic and circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." State v. Brown, 939 S.W.2d 882, 883-884 (Mo. 1997).

However, when trial court's evidentiary ruling involves a violation of the United States

and Missouri Constitution Due Process Clause and/or Confrontation Clause the appropriate standard of review is that Ms. Jaco's conviction must be set aside unless this Court determines beyond a reasonable doubt that the trial court error was harmless. Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986); Olden v. Kentucky, 488 U.S. 227, 233 (1988); State v. Driscoll, 55 S.W.3d 350, 356 (Mo. 2001) *citing* Neder v. United States, 527 U.S. 1, 15-16 (1999).

"Where a case stands or falls on the jury's belief or disbelief of essentially one witness, that witness' credibility or motive must be subject to close scrutiny." State v. Joiner, 823 S.W.2d 50, 55 (Mo. Ct. App. 1991) *quoting* State v. Hedrick, 797 S.W.2d 823, 827 (Mo. Ct. App. 1990) *quoting* State v. Roberts, 611 P.2d 1297, 1300-01 (1980).

If the issue before this Court were the trial's court admission over objection certain photographs, then the applicable standard of review is likely abuse of discretion.

However, this issue involves something more than mere refusal to admit evidence. Rather, it involves the denial of Ms. Jaco's constitutional right to due process and to confront her accuser and therefore the proper standard of review is that this Court must set aside her conviction unless the error was harmless beyond a reasonable doubt.

Due Process Clause and Confrontation Clause

The Fifth Amendment of the United States Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ... nor be deprived of life, liberty, or property, without due process of law." U.S.C.A., *Const. Amend. V.*

The Fourteenth Amendment of the United States Constitution provides that " [n]o State

shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S.C.A. *Const. Amend. XIV.*

The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor." U.S.C.A. *Const. Amend. IV.* "[T]his bedrock procedural guarantee applies to both federal and state prosecutions." Crawford v. Washington, 72USLW 4229, 124 S.Ct. 1354, 1359 (2004).

Article I, § 10 of the Missouri Constitution provides "[t]hat no person shall be deprived of life, liberty or property without due process of law." Mo. Const. art. I, § 10.

Article I, § 18(a) provides "[t]hat in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel ... to meet the witnesses against him face to face [and] to have process to compel the attendance of witnesses in his behalf." Mo. Const., art. I, § 18(a).

The principles of Due Process invoke the "basic principles of fairness" and guarantees a criminal defendant's right to present evidence in his or her behalf in an effort to counter the State's case-in-chief and thereby present a defense against the prosecution. State v. Samuels, 88 S.W.3d 71, 83 (Mo. Ct. App. 2002). Additionally, "[a] defendant's rights to confront and cross-examine witnesses and to call witness in his own defense are 'essential to due process and guaranteed by the Fourteenth Amendment". Id. at 82.

Photograph Exclusion and Error

The first issue is the trial court's error in refusing to admit Exhibit J into evidence because the apartment furnishings were different, yet the floor plan remained unchanged. It is clear that trial court error occurred in that any change in the furnishings depicted in the photograph simply goes to the weight that the evidence receives and does not effect its admissibility as stated below.

As an example of the changed conditions depicted in a photograph Ms. Jaco first brings this Court's attention to State v. Williams, 849 S.W.2d 575 (Mo. Ct. App. 1993). In that case the issue before the court was whether the trial court erred in admitting photographs of the crime scene when it was claimed that the photographs misrepresent that scene "because the trees were portrayed without leaves, while they had leaves at the time of the incident, and the dumpster wheels were not in the condition portrayed in the photograph at the time of the incident." Id. at 580. That court recognized that "[t]rial courts have broad discretion in determining the admissibility of photographs." Id. The court further stated that "[p]hotographs are admissible if they are relevant to a material issue. The photographs were admitted to show the general area where the crime took place. The state stipulated to the fact that the trees had leaves at the time of the incident and that there was a different dumpster there at the time." Id. (internal citations omitted). Ultimately, the Williams court held that the photographs may be admitted even though minor items depicted therein are different from those present at the time the incident occurs. Id.

Next, Ms. Jaco brings to this Court's attention State v. Diercks, 674 S.W.2d 72 (Mo. Ct. App. 1984). The issue before that court involved whether photographs were properly

admitted when the photographs were taken one month after the incident occurred. Id. at 80. In that case, marijuana plants were seized by law enforcement officers and a photograph of the plants was taken one month after their seizure. Id. The objection lodged with the court was that the photograph "did not depict conditions existing at this scene of the crime." The court recognized that "[s]ome of the plants had grown between the time of their seizure and the time the photographs were taken, and some had deteriorated from lack of care." Nonetheless, the court held that the "admissibility of photographs rest in the discretion of the Court and any differences existing in the conditions between the time of the crime and the taking of the photographs may be developed in the evidence. Any such differences goes only to the weight of the evidence." Id.

In State v. Schlup, 724 S.W.2d 236, 242 (Mo. Ct. App. 1987), the defendant claimed that error occurred when the trial court "admitted into evidence photographs depicting [the witness'] view of the murder scene." The Court held that the photographs depicting the witness' view of this scene corroborated the witness' testimony "by demonstrating that he could have witnessed the murder from his station." Id. Moreover, the fact that the photographs did not depict the witnesses' "exact vantage point is merely a factor which affects the weight to be given the photographs by the jury." Id. As such, the trial court did not commit error in admitting the photographs at trial. Id.

In State v. Stephens, 708 S.W.2d 345 (Mo. Ct. App. 1986), the Court was once again confronted with the admissibility of photographs where there was a change in conditions. In that case, the issue was whether error was present when a photograph was admitted that was

taken where an outdoor light was on at the time the photograph was taken. Id. at 350. The claim made by the defendant there was that the photograph was misleading because "there was a dispute as to whether or not the light was on at the time of the rape." Id. The Court stated, in reliance upon State v. Johnson, 508 S.W.2d 18, 20 (Mo. Ct. App. 1974), the following:

> The test is whether photographic evidence shows relevant facts which will aid the jury. Photographs taken of a crime scene which reveal different conditions from those existing at the time the crime occurred are admissible and any objections to such photographs go to the weight of the evidence; any differences in conditions may be developed in the evidence.

Id. The court ultimately held that "[t]he evidence concerning the neighbor's outside light has been stated. The victim did not specifically recall whether the neighbor's light was on but the photograph depicts conditions and circumstances at the crime scene. Any differences in the area between the photograph and at the time of the offense was thoroughly developed by the evidence." Id. Thus, the photograph was properly received into evidence.

In State v. Smith, 563 S.W.2d 162, 163 (Mo. Ct. App. 1978), the Court was confronted with the issue of admitting a photograph where there was a change in conditions. The crime "occurred in April but the photograph was taken in the winter so the photograph did not show any foliage. In addition, the road on which [defendant] was arrested was only partially completed at the time of the crime but the photograph revealed the road to be fully constructed." Id. The court recognized that the differences between the condition of the

property at the time of the crime and at the time the photograph was taken were fully explained to the jury. Id. Ultimately, the court held that the admission of the photograph was proper because "any differences existing in the conditions between the time of the crime and the taking of the photograph may the developed in the evidence. Such differences goes only to the weight to be accorded the photograph." Id. Thus, the change in seasons, the lack of foliage and the construction of the road did not affect the admissibility of the photograph.

In State v. Shipman, 568 S.W.2d 947, 953 (Mo. Ct. App. 1978), the Court held that a photograph taken only "a few days prior to trial" was admissible where said photograph was made of the crime scene through the re-creation of events. In that case, the defendant was charged with attempted burglary and possession of burglary tools. Id. at 949. The evidence in that case included the testimony of an officer where said officer claimed that he discovered the defendant attempting to pry open the rear door of a grocery store. Id. at 953. Found alongside the defendant were several tools used in the commission of this crime. Id. Said items were taken into the officer's custody following the defendant's arrest. Id. Immediately prior to trial, the officer returned to the crime scene and placed the three items on the ground at the "approximate location" he found them. Id. A photograph was then taken of this scene depicting the aforesaid reconstruction. Id.

The Shipman Court held that "[i]dentification of exhibits need not be wholly unqualified in order to make them admissible into evidence. Any qualification as to the identity of exhibits, if otherwise admissible, is for the jury to weigh. Testimony that an exhibit 'looks like', ' looks familiar', 'looked like', looked ' very much' like, looked 'very similar', and 'was

a gun like' has been held sufficient to permit the exhibits' introduction into evidence." Id. at 953-954.

The Court in Shipman provided guidance and, relying upon State v. Rogers, 523 S.W.2d 344, 347 (Mo. Ct. App. 1975), stated the following:

> Photographs of the scene of an alleged crime are admissible in evidence at a criminal trial if they depict the conditions and circumstances surrounding the alleged crime and aid the jury in throwing light on a material issue in the case. The admissibility of photographs of a scene is a matter resting primarily within the discretion of the trial court ... The test is whether the photographic evidence shows relevant facts which will aid the jury ... The essential factor whether a photograph is admissible depends upon whether the photograph represents the observation of the witness. The accuracy of the photograph may be proved by anyone who knows the facts. Photographs are admissible when the witness shows that they are a reasonably accurate representation of the place or thing in question in order to aid the jury in understanding the testimony of the witness. The fact that a photograph may be incorrect in certain particulars or that there are changes in the scene does not affect the admissibility of the photograph but only affect the weight to be given to it by the jury.

Id. at 954.

In State v. Rogers, 523 S.W.2d 344, 347 (Mo. Ct. App. 1975), the Court held that a photograph of a building was properly admitted into evidence despite the fact that the building's windows were boarded-up at the time the photograph was taken. The Court stated that "[t]he fact that a photograph may be incorrect in certain particulars or that there are changes in the scene does not affect the admissibility of the photograph but only affect the weight to be given to it by the jury." Id. The Court stated that "the fact that [the victim's] windows of the building were boarded up does not affect the admissibility of the photograph introduced and admitted by the trial but only the weight to be given to the photograph. [The officer involved] testified that, except for the fact that the windows have been boarded up, the picture 'fairly and accurately' portrays the location of the building and the windows on that October day." Id.

Next, in State v. Johnson, 508 S.W.2d 18 (Mo. Ct. App. 1974), the issue before that court was whether there was error in admitting photographs of a crime scene because the photographs "were taken during the day whereas the incident occurred at night when it was raining." Id. at 20. The court stated that "[t]he test is whether photographic evidence shows relevant facts which will aid the jury. Photographs taken of a crime scene which reveal different conditions from those existing at the time the crime occurred are admissible and any objections to such photographs go to the weight of the evidence; any differences in conditions may be developed in evidence." Id. The court held that the photographs were properly admitted despite the different conditions from those existing at the time the crime took place and at the

time the photograph was taken. Id. In support of its holding, the court stated "[t]hese differences were pointed out to the jury; thus, it was for the jury to consider their value and weigh them accordingly." Id.

In State v. Kinder, 496 S.W.2d 335, 339 (Mo. Ct. App. 1973), the court was confronted with the issue of admitting a photograph of a crime scene where the furnishings were altered at the time the photograph was taken in comparison to the furnishings at the time the incident occurred. The Court held the admission of the photograph was proper and that "[a]ny changes in the location of chairs around the table as contended by the appellant will go only to the weight to be given to the exhibits, not to their admissibility." Id.

In State v. Moore, 353 S.W.2d 712, 714 (Mo. Ct. App. 1962), the Court addressed the issue of the admission of photographs where it was claimed the photographs "did not reflect actual conditions that the time of the alleged rape." The Court stated that "the differences shown were that they were taken in the daytime rather than at night and showed snow on the ground which was not there on the evening. These differences were shown in the evidence and stated by the court in admitting them." Id. As such, the Court held that the admission of the photographs was proper and that the differences in conditions only affected the weight to be given to same. Id.

In State v. McGee, 83 S.W.2d 98, 106 (Mo. 1935), the Court was confronted with the admission of several photographs and was required to determine whether error occurred when said photographs were admitted a trial. The changes in question included, but were not limited to, the presence of a window and the presence of a certain iron ring protruding from a wall.

Id. at 107. In reviewing this issue, the Court held that photographs "are admissible in evidence when shown to be reasonably accurate representation of the place or thing in question, to help the jury in understanding testimony of the witnesses." In fact, the Court stated that "[i]t does not affect the admissibility of such a representation, if it be shown that it is incorrect in some particulars, but only its weight." Id. It cannot be contested that photographs and diagrams that simply reconstruct the conditions at the time of an offense are admissible in evidence. Id. In the event that there are certain inaccuracies depicted in the photograph, these inaccuracies "are generally more properly in matter for impeachment, going to the weight rather than the competency of the evidence." Id. Thus, the photographs were properly admitted at trial despite the fact that the conditions at the time the crime occurred were different than those present at the time the photographs were taken. Id.

In Young v. Dunlap, 190 S.W. 1041, 1044 (Mo. Ct. App. 1916), the Court held that error occurred when the trial court refused to admit a photograph at trial. The basis relied upon by the trial court was that the automobile "was not in the same condition when the picture was taken as it was immediately after the collision." Id. In holding that error occurred, the Court stated that "[t]here were some changes made [to the automobile] necessary to get the machine home, but these points of difference could be made the basis for cross-examination, thus enabling the jury to give proper weight to the evidence."

In this case, the apartment in question was surrendered to the landlord and rented once again to a new tenant, who obviously possessed different furnishings. (Tr. Vol. II 324:17-24; Vol. IV 692:6-11). Thus, at the time the apartment was surrendered and prior to the change in

furnishings, the importance of obtaining Exhibit J was yet unknown in that discovery from the State, including the photographs, was only received after the Grand Jury Indictment was returned. (L.F. 23). Thus, this case is the precise situation envisioned in fashioning the weight versus admissibility rule employed by the Courts; the differences in conditions can be explained while still respecting a party's right, specifically a criminal defendant's right to present evidence in their behalf.

Ms. Jaco brings this Court's attention to State's Exhibit Number 17 which is a photograph depicting the coffee table with a blue plastic box on its top and tennis shoes underneath. (L.F. 108) (App. A3). Also, Ms. Jaco desires this Court to examine Defendant's Exhibit H/State's Exhibit 20, which demonstrates the unchanged floor plan when compared to Defendant's Exhibit J, and again highlights the blue plastic box, which supports the fact that the photograph was taken at a different location from where Mr. Eckhoff claims Ms. Jaco was located, which was between the coffee table and the couch, (App. A2), arms outstretched and facing away from the window towards the bedroom at the approximate location of these tennis shoes. (App. A3) (Tr. Vol. II 393:7-25; 394:1-2; Vol. II 395:25). Moreover, that Christy picks up Zachary, who is situated to her left, and with arms extended at shoulder height, with her right side exposed to his view, shakes Zachary, who weighs approximately twenty-seven (27) pounds, back and forth. (Tr. Vol. I 235: 3-8; Vol. II 391:24-25; Vol. II 395:3-14; Vol. II 401:16). Also, Mr. Eckhoff acknowledged that his prior statement to the prosecuting attorney's investigator included his statement that while this shaking occurred, Ms. Jaco held a finger to her mouth and said be quiet. (Tr. Vol. 400:11-21). Thus, Mr. Eckhoff's claims

were the subject of direct attack, including his ability to observe same.

In an effort to fully describe the situation, photographs were offered by both the State and Ms. Jaco. Unfortunately, not one of the photographs offered by the State were taken from the specific location where Mr. Eckhoff claims that Christy was located when he claims to have observed the shaking. (L.F. 105-124). In fact, one photograph, which is arguably the most relevant photograph that was admitted at trial, depicted a view from the living room to the kitchen that was either taken on the opposite side of the coffee table from where Mr. Eckhoff claims Christy was located or the photograph was taken while straddling that same table. (App. A2) (L.F. 109) (Tr. Vol. II 315:3-11).

Exhibit J was taken from the precise location Mr. Eckhoff claims Ms. Jaco was standing at the time the shaking occurred, but the claimed observations of Mr. Eckhoff cannot be made due to an obstructed view caused by a wall, which would certainly preclude Mr. Eckhoff's ability to view the claimed shaking. Thus, the one photograph depicting a fair representation of the layout and the line of sight between Ms. Jaco and Mr. Eckhoff was excluded. (App. A1). This photograph would have destroyed Mr. Eckhoff's credibility in recounting the manner of events and in light of the jury's request for the photographs during deliberations it is obvious that his ability to make the claimed observation was important to the jury. (L.F. 170) (App. A1).

Therefore, in light of the foregoing, Defendant submits that the trial court committed error in refusing to admit Exhibit J at trial in this matter. Any change in the furnishings of the apartment simply affects the weight given to the photograph; it does not affect its admissibility.

It cannot be contested that Matthew Eckhoff's testimony and his claimed observations were the focal point of the State's case and the primary matter in contention at trial. Moreover, the tendered but refused photograph fairly demonstrated Mr. Eckhoff's claimed line of sight, who was the sole eye-witness, and proved his observation was impossible to make. (App. A1). Thus, Ms. Jaco was precluded from cross-examining, confronting and contradicting the State's chief witness with this critical piece of evidence and presenting evidence in her own defense which resulted in her due process right and confrontation rights guaranteed by the United States Constitution and the Missouri Constitution were violated.

Photograph Exclusion Resulted In Prejudicial, Reversible Due Process Violation And An Impermissible Infringement on Defendant's Right to Confront Her Accuser

Next, after determining that the trial court error occurred, this Court must determine the prejudicial impact of the constitutional error. If the error is not harmless beyond a reasonable doubt, Ms. Jaco's conviction must be set aside and reversed. Olden v. Kentucky, 488 U.S. 227, 232-234 (1988). Once again, "[a] defendant's rights to confront and cross-examine witnesses and to call witness in his own defense are 'essential to due process and guaranteed by the Fourteenth Amendment'". Samuels, 88 S.W.3d at 82.

In reviewing this type of error's damaging effect, the United States Supreme Court stated that:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless

> beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Delaware v. Van Arsdall, 475 U.S. at 684. "[T]he focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial." Id. This Court recognized in State v. Brown, 549 S.W.2d 336, 341 (Mo. 1977), that "[d]epriving a defendant of the benefit of testimony given by a defense witness in a criminal case takes on additional significance because the state and federal constitutions vest a constitutional right in the defendant to confront his accusers, to cross-examine them, and to call witnesses in his own behalf."

Similar to the case before this Court, reversible trial court error was present in Olden v. Kentucky. 488 U.S. 227 (1988). In that case, the defendant was convicted of forcibly sodomizing a young woman and he received a ten-year prison sentence. Id. at 230. The defense offered to the jury was that the sexual activity between the defendant and the victim was consensual. Id. The defendant desired to confront the victim, who was the chief

prosecution witness, with her current living arrangement in an effort to demonstrate her motive to fabricate her version of events, which was to protect her romantic relationship with her boyfriend at the time the act occurred, who was her live-in boyfriend at the time of trial, by claiming a rape occurred. Id. The trial court did not allow this cross-examination. Id.

The Olden Court recognized that the trial court possessed broad discretion to prevent repetitive and/or harassing cross-examination. Id. at 231. The Court also made reference to its holding in Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986), and reaffirmed its holding that "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness and thereby 'to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness.'" Id. The Court, in reversing the defendant's conviction, held that the victim's testimony "was central, indeed crucial, to the prosecution's case," that the victim's story was contradicted by the defendant and another witness, that the victim's story was corroborated only by her boyfriend's testimony, which was merely derivative from the victim, and the evidence against the defendant was not overwhelming. Id. at 233.

In Davis v. Alaska, 415 U.S. 308 (1974) a trial court's refusal to allow a defendant full cross-examination of a witness was examined by the Court. In that case, the defendant was convicted of grand larceny and burglary due to his stealing a safe from a bar. Id. The witness in question testified that he observed the defendant along a road on two (2) separate occasions; one time with a crow bar in his hand. Id. at 310. The safe was later discovered opened,

apparently pried upon with a crow bar. Id. at 309. This witness, at the time the identification was made and at the time of trial, was on probation to the juvenile court for burglary. Id. at 310-311. The prosecution sought a protective order preventing the defendant's cross-examination of the witness as to his delinquent past. Id. The prosecution's request was sustained. Id. at 311.

The Davis Court began its analysis by recognizing that the Confrontation Clause is something more than physical confrontation, but rather, and most importantly, the right to fully and effectively cross-examine the witness. Id. at 315. In fact, "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Id. at 316. This right to cross-examine includes the opportunity to impeach, contradict and/or discredit the witness. Id. The Court recognized that the defendant was permitted to cross-examine the witness extensively, and in fact imply untruthfulness, but the defendant "was unable to make a record from which to argue why Green [the witness] might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial." Id. at 318. The Court further recognized, although the implications were present, that the limitations placed upon the cross-examination by not introducing the witness' criminal history likely resulted in the jury believing that the defendant "was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness." Id.

The Court, in reversing the defendant's conviction, held that the defendant should not have been placed in the unfortunate position of appearing to propose speculative questions and the jury was entitled to have "the benefit of the defense theory before them so that they could

make an informed judgment as to the weight to place on Green's testimony which provided 'a crucial link in the proof.'" Id. at 317. Because the witness' testimony involved the key elements in the prosecution, "[t]he claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer ... as well as of Green's possible concern that he might be a suspect in the investigation." Id. (internal citations omitted).

In United States v. Barnes, 798 F.2d 283 (8th Cir. 1986), the Court reversed a defendant's conviction due to a trial court's limitation placed on cross-examination. In that case, the defendant sought to impeach the chief witness' testimony with inconsistent pretrial statements. Id. at 288. The Court refused this line of cross-examination. Id. at 289. The Barnes Court recognized that trial courts possess great latitude in imposing limits on cross-examination. Id. at 290. However, this latitude must comport with the Confrontation Clause. Id. In fact, "[t]he trial court's limitation was supported only by flawed reasoning, not justifiable trial concerns, and the limitation denied Barnes an opportunity to effective cross-examination. The Court, in holding that the error was not harmless beyond a reasonable doubt, stated that the proposed attack on the chief witness' credibility made it possible that the jury's verdict would have been different. Id.

In United States v. Love, 329 F.3d 981 (8th Cir. 2003), the Court reversed a defendant's conviction because the Confrontation Clause was violated. In that case, the defendant was convicted of illegally possessing a firearm because he was a convicted felon. Id. at 983. The prosecution offered only one (1) eyewitness in support of this charge, who suffered from

certain psychiatric issues that could affect his ability to recall. Id. The defendant during cross-examination of this eye-witness began to inquire into these psychiatric issues, but the inquiry was short-lived and disallowed by the trial court. Id. at 985. The Love Court first examined the proposed line of questioning in light of the psychiatric issues. Id. It determined that the nature of the issues involved the witness' ability to relate the truth. Id. Due to this possible impairment, coupled with the length of time between the claimed observation and the time of trial, the Court concluded that "the district court violated Love's right of confrontation by limiting his cross-examination." Id.

Next, the Court examined whether this error was harmless beyond a reasonable doubt. The Court in reviewing whether reversal was required considered that the witness' testimony was critical in the prosecution; the witness was the only one presented that claimed to have made the observation; the record is void of any other evidence addressing this issue; and the strength of the prosecutions' case was not overwhelming. Id. at 986. Ultimately, the Court stated that:

> In conclusion, only one witness –Thomas– stated that he actually observed Love possess a firearm. Love was barred from pursuing a line of questioning into this critical witness's [sic] impaired memory diagnosis. This limitation denied Love his constitutionally-guaranteed right to effectively cross-examine Thomas, and we cannot definitively state "that this denial did not contribute to the verdict obtained." We reverse and remand for

new trial.

Id. at 986 (internal citations omitted).

In State v. Samuels, 88 S.W.3d 71 (Mo. Ct. App. 2002), the Court of Appeals addressed a Due Process violation that resulted in unjustifiably limiting the defendant's right to present evidence in his defense and also cross-examine his accuser. The defendant was found guilty of several sex offenses, including statutory rape and statutory sodomy. Id. at 74. The sole issue presented involved the trial court's precluding the defendant from presenting separate claims of rape made by the victim that identified men other than the defendant. Id. at 76. This information would be elicited and presented through cross-examination and presentation of evidence in his case-in-chief. Id. The State presented evidence and testimony inferring that the defendant was the sole cause of the victim's physical condition. Id. at 78-79. The Court held that the defendant's "right to a fair trial was violated when he was not allowed to counter the inference by showing that other sexual activity could have accounted for [the victim's] physical condition."

In reversing six (6) of the Defendant's convictions, the Court recognized that the "basic principles of fairness" mandate that the defendant have the right to counter and attack the evidence presented by the State depicting the defendant as solely responsible for causing the victim's physical condition. Id. at 82. In fact, the trial court's precluding the presentation of this "curative evidence resulted in a violation of his due process rights."

In State v. Joiner, 823 S.W.2d 50 (Mo. Ct. App. 1991), the Missouri Court of Appeals addressed a Confrontation Clause violation. In that case, the defendant's cross-examination

of the prosecution's chief witness was limited by the trial court. Id. at 51. The defendant sought to cross-examine the sole eye-witness as to the witness' pending criminal charges, which were filed and being handled by the same prosecuting attorney's office as the one in the defendant's trial. Id. at 52. The trial court disallowed this line of cross-examination. Id. The Joiner court first began by stating that "a defendant in a criminal prosecution has a constitutional right to cross-examine the witness, for the purpose of showing possible motive or self-interest on actual or threatened criminal charges presently pending by efforts of the same prosecutor." Id. at 53. In addressing the issue of prejudice to the defendant, the Court agreed that the witness "is the only eye-witness and his testimony the only proof of guilt. The remainder of the state's case is based primarily on witnesses who can only show a potential motive for the shooting ... In short, the heart of the state's case lies in the eye-witness identification of Cole." Id. 54-55.

"Where a case stands or falls on the jury's belief or disbelief of essentially one witness, that witness' credibility or motive must be subject to close scrutiny." Id.; *quoting* State v. Hedrick, 797 S.W.2d 823, 827 (Mo. Ct. App. 1990) *quoting* State v. Roberts, 611 P.2d 1297, 1300-01 (1980).

A Picture Is Worth A 1,000 Words

In the instant case before this Court, the one and only witness essential to the prosecution was Matt Eckhoff and therefore his credibility must be subject to close scrutiny. Matt Eckhoff's credibility, and thus Ms. Jaco's guarantee of due process, including her right to confrontation, contradiction and effective cross-examination, hinged on confronting Mr.

Eckhoff with Exhibit J; it was the determining factor and involved undisputable physical evidence that would serve to completely impeach his testimony. In fact, confronting this sole eye-witness with this exhibit would have resulted in Ms. Jaco's exoneration. As such, the trial court's excluding Exhibit J resulted in a violation of Ms. Jaco's due process rights, including her right to present evidence and confront her sole accuser, and this error was not harmless beyond a reasonable doubt. Therefore, her conviction for Abuse of a Child must be set aside and held for naught and this matter must be remanded for a new trial.

II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT REFUSED MS. JACO'S REQUEST TO CROSS-EXAMINE TWO (2) EXPERT WITNESSES ABOUT THEIR RESPECTIVE FAMILIARITY WITH SCIENTIFIC STUDIES INVOLVING SHAKEN BABY SYNDROME BECAUSE ANY SCIENTIFIC STUDY THAT IS GENERALLY ACCEPTED IN THE SCIENTIFIC COMMUNITY IS PROPER USE IN CROSS-EXAMINING EXPERT WITNESSES AND MAY BE ALSO RECEIVED AS PROPER PROFILE EVIDENCE IN THAT THE TRIAL COURT'S REFUSAL TO ALLOW THESE CROSS-EXAMINATIONS AND PRESENTATION OF EVIDENCE VIOLATED THE DEFENDANT'S RIGHTS BESTOWED UPON HER BY THE FIFTH AMENDMENT AND FOURTEENTH AMENDMENT DUE PROCESS CLAUSES AND/OR THE SIXTH AMENDMENT CONFRONTATION CLAUSE OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 AND ARTICLE I, SECTION 18(a) OF THE MISSOURI CONSTITUTION.

Ms. Jaco next presents to this Court the issue of whether the trial court committed reversible error when it refused her the right to cross-examine two (2) of the State's expert witnesses about their respective familiarity with scientific studies that were generally accepted in the scientific community and/or to introduce the results of those same studies into evidence. Ms. Jaco believes that this evidence should have been received by the trial court and presented to the jury and the trial court's refusal resulted in prejudicial reversible error.

Standard of Review

Ms. Jaco acknowledges that the normal standard of review employed involving a trial court's ruling on evidence, including admitting or refusing expert testimony, is one of abuse of discretion. State v. Storey, 40 S.W.3d 898, 910 (Mo. 2001). An abuse of discretion occurs when the trial court's ruling is "clearly against the logic and circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." State v. Brown, 939 S.W.2d 882, 883-884 (Mo. 1997).

However, when trial court's evidentiary ruling involves a violation of the United States and Missouri Constitution Due Process Clause and/or Confrontation Clause the appropriate standard of review is that Ms. Jaco's conviction must be set aside unless this Court determines beyond a reasonable doubt that the trial court error was harmless. Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986); Olden v. Kentucky, 488 U.S. 227, 233 (1988); State v. Driscoll, 55 S.W.3d 350, 356 (Mo. 2001) *citing* Neder v. United States, 527 U.S. 1, 15-16 (1999).

Once again, "[w]here a case stands or falls on the jury's belief or disbelief of essentially one witness, that witness' credibility or motive must be subject to close scrutiny." State v. Joiner, 823 S.W.2d 50, 55 (Mo. Ct. App. 1991) *quoting* State v. Hedrick, 797 S.W.2d 823, 827 (Mo. Ct. App. 1990) *quoting* State v. Roberts, 611 P.2d 1297, 1300-01 (1980).

Due Process Clause and Confrontation Clause

The Fifth Amendment of the United States Constitution provides that "[n]o_person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ... nor be deprived of life, liberty, or property, without due process of law." U.S.C.A., *Const. Amend. V*.

The Fourteenth Amendment of the United States Constitution provides that " [n]o State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S.C.A. *Const. Amend. XIV.*

The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor." U.S.C.A. *Const. Amend. IV.* "[T]his bedrock procedural guarantee applies to both federal and state prosecutions." Crawford v. Washington, 72USLW 4229, 124 S.Ct. 1354, 1359 (2004).

Article I, § 10 of the Missouri Constitution provides "[t]hat no person shall be deprived of life, liberty or property without due process of law." Mo. Const. art. I, § 10.

Article I, § 18(a) provides "[t]hat in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel ... to meet the witnesses against him face to face [and] to have process to compel the attendance of witnesses in his behalf." Mo. Const., art. I, § 18(a).

The principles of Due Process invoke the "basic principles of fairness" and guarantees a criminal defendant's right to present evidence in his or her behalf in an effort to counter the State's case-in-chief and thereby present a defense against the prosecution. State v. Samuels, 88 S.W.3d 71, 83 (Mo. Ct. App. 2002). Additionally, "[a] defendant's rights to confront and cross-examine witnesses and to call witness in his own defense are 'essential to due process and guaranteed by the Fourteenth Amendment". Id. at 82.

Statistical Studies

Prior to trial, Ms. Jaco deposed Dr. Jane Turner, the pathologist involved in this case. (L.F. 133). At her deposition, Dr. Turner was questioned about scientific studies that she recognized as authoritative treatises, journals and periodicals and generally accepted within the scientific community. (L.F. 164-167). The pertinent findings in those studies that Dr. Turner acknowledged as reliable and accepted in her field included the following:

a. That children living in households with one or more male adults not related to them are at risk for maltreatment, injury or death. Moreover, that these same children were subjected to abuse or even death as a result of shaking or blunt trauma.

b. That these studies establish that children living in households with adult men unrelated to them are eight (8) times more likely to die of abuse then children living with one or both biological parents.

c. That most perpetrators of shaking and/or blunt trauma to children are unrelated males.

d. That a risk factor for infant children being abused is where the child is living with a step-father or the mother's boyfriend.

e. That scientific studies established that a common accidental injury explanation/defense offered by perpetrators is that the baby was in some form of distress, choking or not breathing and the perpetrator mildly shook the baby in a vain effort to revive the baby.

(L.F. 164-167; 230-232). It should be accepted as a maxim of the Court's of this State that evidence is presumably relevant if it assists the jury in arriving at the truth. State v. Sager, 600 S.W.2d 541, 573 (Mo. Ct. App. 1980) (holding that scientific evidence should not be excluded if the purpose is to offer to the jury the totality of the circumstances in arriving at the truth).

In the case before this Court, it was undisputed that Mr. Matthew Eckhoff was unrelated to Zachary Brooks, the infant victim. (Tr. Vol. III 619:4; 619:12-13; 637:3-10). It was equally undisputed that Mr. Eckhoff resided with Zachary Brooks. (Tr. Vol. II 325:11). Lastly, it was undisputed that Mr. Eckhoff's first several statements made to the investigating officers claimed that Zachary was in some form of distress, that he then shook Zachary for several moments, Mr. Eckhoff then placed Zachary on the floor where his head made a popping sound when it made contact with the floor and that Mr. Eckhoff claims to take other steps in which to revive Zachary. (Tr. Vol. II 349:25; Vol. II 350:7-10; Vol. II 438:10-16; Vol. II 439:1-5; Vol. II 440:6-23; Vol. II 350:22-23; Vol. II 442:3-5; Vol. II 351:21-15).

Prior to trial, Ms. Jaco filed a Motion in Limine concerning this issue, which was denied by the trial court. (L.F. 164-167) (Tr. Vol. I 7:6-12; Vol. I 191:18-25; Vol. I 192:1-11; Vol. I 237:2-25; Vol. I 238:1-25; Vol. II 239:1-12). This Motion in Limine was renewed and an offer of proof was timely made during the cross-examination of Dr. Martin Keller and Dr. Jane Turner. (Tr. Vol. I 7:6-12; Vol. I 191:18-25; Vol. I 192:1-11; Vol. I 237:2-25; Vol. I 238:1-25; Vol. II 239:1-12). Once again, Ms. Jaco's requests to cross-examine and/or present this scientific evidence was denied. (Tr. Vol. I 7:6-12; Vol. I 191:18-25; Vol. I 192:1-11; Vol. I 237:2-25; Vol. I 238:1-25; Vol. II 239:1-12).

Admissibility of Expert Testimony

It cannot be readily contested that expert testimony is admissible and necessary where the jurors "are not capable, for want of experience or knowledge of the subject, to draw correct conclusions from the facts proved." State v. Williams, 858 S.W.2d 796, 798 (Mo. Ct. App. 1993). In fact, expert opinions are "admissible upon vital issues which only the trier of fact may decide." State v. Taylor, 663 S.W.2d 235, 239 (Mo. 1984). A plausible claim cannot be made that the jury in this matter possessed sufficient knowledge of these scientific studies and/or Shaken Baby Syndrome and therefore the circumstances properly qualify the use of expert testimony when the State offers Dr. Keller's and Dr. Turner as experts in this matter. (Tr. Vol. I 175:3; Vol. I 195:9).

Whether a particular witness is qualified as an expert is an initial determination that must be made by the trial court. State v. Love, 963 S.W.2d 236, 241 (Mo. Ct. App. 1997). The appropriate test is whether the witness possesses some knowledge or skill acquired through experience or education that will assist the trier of fact. Id. In this case, the State presented the testimony of Dr. Keller and Dr. Turner as experts during its case-in-chief and their expert testimony was admitted by the trial court. (Tr. Vol. I 175:3; Vol. I 195:9).

If the witness qualifies as an expert, that witness may then testify to scientific studies and methodologies that are "sufficiently established to have gained general acceptance in the particular field to which it belongs." Id. Moreover, expert testimony may rely on hearsay evidence if that same evidence is "reasonably relied upon by other experts in that field, and such evidence need not be independently admissible." State v. Woodworth, 941 S.W.2d 679,

698 (Mo. Ct. App. 1997). "Any expert witness represents the distillation of the total of his personal experiences, readings, studies and learning in his field of expertise, and he may rely on that background, hearsay or not, as basis for his opinion." Id. (permitting expert witness to testify regarding firearm manufacturing process because they "had extensively studied the field of firearms and were familiar with books and studies on the general manufacture of firearms").

Also, merely because expert testimony involves the modus operandi of a crime does not affect its admissibility. In fact, "[e]xpert testimony is frequently admitted in this and other jurisdictions in order to explain the modus operandi of criminal activity." State v. Marks, 721 S.W.2d 51, 56 (Mo. Ct. App. 1986). Lastly, if the witness is established as an expert that same witness may then lay the requisite foundation that the scientific studies are generally accepted and are authoritative within the scientific community. State v. Cooper, 691 S.W.2d 353, 356-357 (Mo. Ct. App. 1985). Dr. Tuner, and upon information and belief Dr. Keller as well, would have laid the required foundation that the studies were generally accepted and authoritative within the scientific community. (Tr. Vol. I 7:6-12; Vol. I 191:18-25; Vol. I 192:1-11; Vol. I 237:2-25; Vol. I 238:1-25; Vol. II 239:1-12).

Admissibility of Profile Testimony

Additionally, expert testimony involving profile characteristics is equally proper for a jury's consideration during a criminal trial. State v. Williams, 858 S.W.2d 796, 798-799 (Mo. Ct. App. 1993). This type of profile testimony is limited to "describing behaviors and other characteristics commonly observed" in similar situations. Id. In fact, it was recognized

by the Courts of this State that many other jurisdictions affirmed the propriety of general profile testimony. Id.; *citing* United States v. Azure, 801 F.2d 336 (8th Cir. 1986); State v. Moran, 149 Ariz. 472, 728 P.2d 248 (1986); State v. Lindsey, 149 Ariz. 472, 720 P.2d 73 (1986); State v. Newman, 109 N.M. 263, 784 P.2d 1006 (App. 1989); State v. Catsam, 148 Vt. 366, 534 A.2d 185 (1987); State v. Myers, 382 N.W.2d 91 (Iowa 1986); Sexton v. State, 529 So.2d 1041 (Ala. Crim. App. 1988); State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983); Brady v. State, 540 N.E.2d 59, 71 (Ind.App. 3 Dist. 1989). The rationale in allowing general profile testimony is that it will assist the jury in weighing the testimony of other witnesses testifying at trial. Williams, 858 S.W.2d at 799. This type of evidence will also assist to explain behavior that a typical juror may believe to be unusual. Id. However, testimony attacking or supporting a specific witness' credibility is improper. Id.

The admission of general profile testimony is proper in Shaken Baby Syndrome cases. State v. Candela, 929 S.W.2d 852, 865-866 (Mo. Ct. App. 1996) (stating that during shaken baby syndrome/murder prosecution it is proper to admit "profile testimony, or general evidence describing behaviors and characteristics commonly observed in victims [and] Missouri courts have allowed the state to offer expert testimony regarding shaken infant syndrome to identify the cause of the victim's injuries") (internal citations omitted). Expert testimony is also permissible where it directly comments on who may have caused the injuries in question. State v. Hayes, 88 S.W.3d 47, 63 (Mo. Ct. App. 2002) (permitting expert testimony that claimed defensive wounds appearing on defendant were consistent with self-infliction). Lastly, expert testimony is certainly admissible in an attempt to identify the

perpetrator of a crime. State v. Rockett, 87 S.W.3d 398, 405-406 (Mo. Ct. App. 2002) (condoning the use of DNA test results, hair analysis and fingerprint comparisons in identifying the defendant as the perpetrator of the crime).

Admissibility of Scientific Studies/General Profile Testimony

In State v. Candela, the Court recognized that "shaken infant syndrome has been implicitly recognized by Missouri Courts as a valid diagnosis." 929 S.W.2d 852, 864 (Mo. Ct. App. 1996). In that case, the defendant was charged with Murder in the Second Degree for causing the death of her boyfriend's daughter, to whom she was not related but lived with. Id. at 856. The first version of events provided by the defendant was that the four -and-half year old girl fell off of a swing. Id. The next version of events was that the child fell out of bed, and/or had fallen off of a swing and that the defendant found this child lying unconscious in a bedroom. Id. at 857. Another version of events was offered by the defendant that she had put the child down for nap and later heard a "gurgling sound; when she went into the bedroom she found [the child] unconscious" and that any bruising was caused by a fall off of a swing. Id. The defendant also told another individual that the child woke up from a nap and then "began to gurgle and cough" and that the other injuries were associated with a swing mishap. Id. The defendant conveyed a different version when she stated that the defendant heard sounds and went into the bedroom but was unable to wake the child up from a nap. Id.

The defendant also executed a written statement that "she put all the children in bed for naps; [the child] later came walking toward defendant, with her eyes rolled back, making a gurgling noise; at this point, defendant took [the child] across the street to the fire station."

Id. at 858.

Another child present in the house indicated that the defendant threw the child in question down the stair steps. Id.

At trial, the defendant claimed that she heard a noise similar to someone running into the refrigerator and then observed the child walk in the kitchen with eyes rolled back in her head and making a gurgling noise. Id. at 859. Her testimony continued that after taking the child to the fire department she had no recollection of events thereafter. Id. The defendant admitted that she was the only adult with the child during the relevant times. Id.

On appeal, the defendant claimed that error occurred because "the state failed to lay a proper foundation establishing (1) the theories relied upon by the witnesses were generally accepted in the relevant scientific community, (2) the factual basis for each witness' opinion, and (3) the sources and materials upon which the witnesses based their opinions were reasonably reliable and of the type relied upon by members of the witnesses' profession." Id. at 863. The Candela Court initially recognized that "shaken infant syndrome has been implicitly recognized by Missouri courts as a valid diagnosis." Id. at 864.

The defendant also argued on appeal that usage of the shaken infant syndrome resulted in a "profile prosecution." Id. at 865. In rejecting this claim, the Court explained that any type of profile involved "was based upon characteristics of the victim, not defendant, and was used to determine the cause of death, not defendant's responsibility for that death." Id. The Court further stated that "[t]he admission of profile testimony, or general evidence describing behaviors and characteristics commonly observed in victims, is within the discretion of the

trial court." Id. Also, "an expert may testify to his or her opinion regarding an ultimate issue in a criminal case, as long as the expert does not express an opinion on the guilt or innocence of the defendant." Id. at 867. The Court ultimately held that the expert testimony did not include evidence claiming that the defendant was responsible for the death and therefore admission of this expert testimony was appropriate. Id. at 866-867.

The case before this Court mandates that the offered testimony be admitted for the jury's consideration. The State originally injected the issue of shaken baby syndrome at trial. Thus, Ms. Jaco should have been permitted to present evidence to fully describe all aspects of this syndrome. The desired cross-examination would not result or include any question that constituted an opinion of Ms. Jaco's guilty or innocence. In fact, the evidence offered did not involve expert testimony involving any claim that Ms. Jaco or Mr. Eckhoff was responsible for the injuries in question or not responsible. Rather, at best, these studies could be considered by the jury, if believed, as additional evidence in fully describing the totality of the circumstances in shaken baby syndrome cases. Thus, the concerns of profile prosecution are not in play. See State v. Sager, 600 S.W.2d 541, 573 (Mo. Ct. App. 1980) (holding that scientific evidence should not be excluded if the purpose is to offer to the jury the totality of the circumstances in arriving at the truth).

Second, the Candela Court indicated that expert witnesses may rely upon the results of published scientific studies in forming their opinion and therefore Ms. Jaco must be permitted to cross-examine the State's expert witnesses as to the familiarity with those same studies in testing the expert witness' opinion where that same witness would have provided the required

foundation of the studies' acceptance in their professional community. Grippe v. Momtazee, 705 S.W.2d 551, 556 (Mo. Ct. App. 1986).

Lastly, at best this type of information may only be considered profile prosecution evidence if Mr. Eckhoff were on trial; he was not. However, if this Court believes that this evidence is properly considered profile prosecution evidence then Ms. Jaco submits that she possesses the right to waive any complaint of profile prosecution by opening the proverbial door. For an example of a waiver of rights, in State v. Copeland, 928 S.W.2d 828, 839 (Mo. 1996), the Court held that the defendant waived her right against self-incrimination when she injected the issue of her mental condition, which was that she suffered from battered woman syndrome and thereby profile evidence to that condition was admissible.

In the case at bar, Dr. Turner would have explained all aspects of shaken baby syndrome and her familiarity of scientific studies involving that particular syndrome. In fact, if allowed by the trial court, her testimony would have included (a) that children living in households with one or more male adults not related to them are at risk for maltreatment, injury or death and that these same children were subjected to abuse or even death as a result of shaking or blunt trauma, (b) that these studies establish that children living in households with adult men unrelated to them are eight (8) times more likely to die of abuse then children living with one or both biological parents, (c) that most perpetrators of shaking and/or blunt trauma to children are unrelated males, (d) that a risk factor for infant children being abused is where the child is living with a step-father or the mother's boyfriend, (e) that scientific studies established that a common accidental injury explanation/defense offered by perpetrators is that the baby was

in some form of distress, choking or not breathing and the perpetrator mildly shook the baby in a vain effort to revive the baby.

Mr. Eckhoff was an unrelated, adult male living with Zachary. Moreover, his first four (4) explanations given to law enforcement after his being identified as a suspect was that Zachary was in some form of distress and that he mildly shook/nudged Zachary in a vain effort to revive him.

Ms. Jaco maintains that if her constitutional right to a fair trial and her constitutional right to due process are to have any force and effect in a criminal trial, these studies are relevant and admissible and must be given to the jury in order to fully explain the full totality of the circumstances involving shaken baby syndrome. These studies would not result in a comment on any individual's guilt or innocence and therefore constitutes proper cross-examination and/or evidence for presentation to the jury. The trial court's failure to permit the admission of this evidence resulted in a violation of her constitutional rights, including her right to due process and confrontation. These infringements require the reversal of her conviction and that this matter be remanded for a new trial.

III. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT DENIED DEFENDANT'S MOTION TO DECLARE SECTION 557.036 OF THE MISSOURI STATUTES FACIALLY UNCONSTITUTIONAL AND PROCEEDING WITH A BIFURCATED TRIAL BECAUSE THE STATUTE PROVIDES NO PROCEDURAL SAFEGUARDS TO A DEFENDANT DURING THE PENALTY PHASE OF A BIFURCATED TRIAL INCLUDING, BUT NOT LIMITED TO, (A) DOES NOT IDENTIFY THE STANDARD OF PROOF THAT A JURY MUST EMPLOY IN REVIEWING EVIDENCE IN AGGRAVATION DURING THE PENALTY PHASE, (B) THE STATUTE DOES NOT REQUIRE THAT THE STATE PROVIDE NOTICE TO A DEFENDANT OF EVIDENCE IN AGGRAVATION THAT IT INTENDS TO PRESENT DURING THE PENALTY PHASE AND DOES NOT REQUIRE THAT THE STATE PROVIDE NOTICE TO A DEFENDANT OF THE WITNESSES THAT WILL TESTIFY DURING THE PENALTY PHASE, (C) THE STATUTE PERMITS THE INTRODUCTION OF CHARACTER EVIDENCE DESPITE THE FACT THAT THE DEFENDANT HAS NOT INJECTED THE ISSUE OF CHARACTER AT TRIAL, AND (D) THE MISSOURI LEGISLATURE ENCROACHED UPON AN AREA RESERVED TO THE JUDICIAL BRANCH AND DIRECTLY AFFECTED THE RIGHT TO A JURY TRIAL, AND IN ENACTING THIS TYPE OF PROCEDURE AND THE PROCEDURE EMPLOYED BY THE COURT IN BIFURCATING THE TRIAL INTO A GUILT PHASE AND PENALTY PHASE VIOLATED THE PROCEDURAL

PROTECTIONS GUARANTEED TO DEFENDANT BY THE FIFTH AMENDMENT, SIXTH AMENDMENT, EIGHTH AMENDMENT AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND/OR ARTICLE I, SECTION 10, ARTICLE I, SECTION 21, AND THE CONSTITUTIONAL SEPARATION OF POWERS PROVIDED IN ARTICLE II, SECTION 1, AND ARTICLE V, SECTION 5 OF THE MISSOURI CONSTITUTION.

The next issue presented by Ms. Jaco is whether the trial court committed reversible error when it denied Defendant's Motion to Declare Section 557.036 Unconstitutional and thereby proceeding with a bifurcated trial in accord with the provisions of that same statute. The grounds for Ms. Jaco's Motion included the fact that the Statute provides no procedural safeguard to a defendant because no guidance is given to the jury as to the specific level of proof and burden of persuasion that must be satisfied in examining evidence in aggravation. Additionally, the Statute provides no procedural safeguard to a defendant because it does not require the State to provide prior notice of (1) a list of aggravating or mitigating circumstances; (2) a list of the witnesses that may testify during the second phase, and (3) documents that the State intends to introduce during the second phase. The Statute also provides no procedural safeguard by allowing the introduction of the defendant's "history and character," without defining the limits of same and even when the defendant has not injected the issue of character. Lastly, the amended procedure directly effected Ms. Jaco's constitutional right to a jury trial and due process when the legislature violated the separation

of powers doctrine.

Ms. Jaco believes that the provisions of Section 557.036 are constitutionally infirm and therefore the trial, both the guilt phase and penalty phase, must be reversed.

Standard of Review

The appropriate standard in reviewing whether Section 557.036 is facially unconstitutional is de novo because it involves simply a question of law. State v. Gentry, 936 S.W.2d 790, 792 (Mo. 1996). Moreover, a statute is presumed valid unless it contravenes a constitutional provision. Asbury v. Lombardi, 846 S.W.2d 196, 199 (Mo. 1993). In fact, this Court is "bound to adopt any reasonable reading of the statute that will allow its validity and to resolve all doubts in favor of constitutionality." Id.

Due Process, Jury Trial, Excessive Punishments and Separation of Powers

The Fifth Amendment of the United States Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ... nor be deprived of life, liberty, or property, without due process of law." U.S.C.A., *Const. Amend. V.* The Fourteenth Amendment of the United States Constitution provides that " [n]o State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S.C.A. *Const. Amend. XIV.*

The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... to be confronted with the witnesses against him [and] to have compulsory process for

obtaining witnesses in his favor." U.S.C.A. *Const. Amend. IV.* The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S.C.A., *Const. Amend. VIII.*

Article I, § 10 of the Missouri Constitution provides "[t]hat no person shall be deprived of life, liberty or property without due process of law." Mo. Const. art. I, § 10. Article I, § 18(a) provides that a criminal defendant possesses a constitutional right to a jury trial. Mo. Const., art. I, § 18(a). Article I, § 20 provides "[t]hat excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." Mo. Const., art. I, § 20.

Article II, § 1 provides that "[t]he powers of government shall be divided into three distinct departments – the legislative, executive and judicial –, and no person or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others." Mo. Const., art. II, § 1. Further, Article V, § 5 provides that it is the duty and power of the judicial branch to "establish rules relating to practice, procedure and pleading for all courts and administrative tribunals." Mo. Const., art. V, § 5. Further, Section 1.160 (1) provides that an amendment to procedural laws shall take immediate effect in a criminal proceeding regardless of when the crime allegedly occurred. V.A.M.S., § 1.160 (1957).

Section 557.036

Section 557.036 of the Missouri Statutes completely altered the trial procedure for a criminal defendant with no criminal history or conviction, and was amended well after Zachary Brooks' suffered his injuries but less than sixty (60) days prior to the this trial beginning, and

enacted was through an emergency clause accompanying this amendment. V.A.M.S. § 557.036 (2003). The particular subsection of this amended statute governing the penalty phase procedure provides that:

> If the jury at the first stage of a trial finds the defendant guilty of the submitted offenses, the second stage of the trial shall proceed. The issue at the second stage of the trial shall be the punishment to be assessed and declared. Evidence supporting or mitigating punishment may be presented. Such evidence may include, within the discretion of the court, evidence concerning the impact of the crime upon the victim, the victim's family and others, the nature and circumstances of the offense, and the history and character of the defendant. Rebuttal and surrebuttal evidence may be presented. The state shall be the first to proceed. The court shall instruct the jury as to the range of punishment authorized by statute for each submitted offense. The attorneys may argue the issue of punishment to the jury, and the state shall have the right to open and close the argument. The jury shall assess and declare the punishment as authorized by statute.

V.A.M.S., § 557.036.3 (2003) (App. A25).

Nowhere in this statute does it provide guidance to a jury advising them of the specific level of proof they must employ in reviewing the evidence in aggravation of punishment. See

V.A.M.S., § 565.030.4 (2001) (App. A31).

Nowhere in this statute does it provide a list of statutory aggravating factors that the jury must consider in increasing the punishment from the minimum punishment authorized by law. See V.A.M.S., § 565.032.2 (1993) (App. A33).

Nowhere in this statute does it require the State to provide notice of the evidence it intends to introduce in aggravation nor does it authorize a defendant's request for same. See V.A.M.S., § 565.005.1 (1983) (App. A30).

Also, if this Court believes that the change is merely procedural, this legislative procedural change violates the separation of powers requirement set forth in Article II, § 1 of the Missouri Constitution, which is reserved solely for the judicial branch.

These failures and infringements violate the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 21 of the Missouri Constitution and/or Article II, § 1 and Article V, § 5 of the Missouri Constitution.

Jury Sentencing

Ms. Jaco acknowledges the holdings of this State indicating that a criminal defendant does not possess a constitutional right to jury sentencing. State v. Hunter, 840 S.W.2d 850, 863 (Mo. 1992); State v. Franklin, 16 S.W.3d 692, 698 (Mo. Ct. App. 2000). However, in Missouri a criminal defendant possesses a statutory right to jury sentencing in cases similar to the one before this Court. Franklin, 16 S.W.3d at 698.

The United States Supreme Court holding in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), held that the Constitution requires that "[o]ther than the fact of a prior conviction, any

fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." However, if the evidence in question involves only a sentencing factor that same evidence need only be established by a preponderance of the evidence and may be found by the trial court. Harris v. United States, 536 U.S. 545, 568 (2002).

It cannot be readily contested that Section 557.036.5, provides that a defendant has a right to a jury sentence recommendation which then would result in the maximum sentence a trial court could then impose. Franklin, 16 S.W.3d at 698; State v. Cooper, 16 S.W.3d 680, 682 (Mo. Ct. App. 2000). Thus, where the applicable statute provides a right to a jury sentence recommendation that serves as a maximum/cap for the defendant's sentence, the facts relied upon must be found beyond a reasonable doubt and failure to do so results in a constitutional violation.

For example, in Cooper, the Missouri Court of Appeals vacated a defendant's sentence and the matter remanded to the trial court because the record did not support the claim that the defendant was a prior offender, and therefore not entitled to a jury sentence recommendation. 16 S.W.3d at 682-683. The defendant was originally charged as a prior offender and therefore the court assumed the duty of determining and pronouncing the defendant's sentence. Id. at 681. However, before the record on appeal was complete the court reporter's bag was stolen, which contained, in part, the prior offender hearing. Id. The primary issue addressed by the Court involved defendant's claim that the trial court improperly found him to be a prior offender and therefore incorrectly found that the defendant was not entitled to jury sentencing.

Id. at 682.

The Court stated that "[a]lthough a criminal defendant does not have a constitutional right to have a jury assess punishment, the defendant's right to a jury's recommendation of sentence is granted by statute, and if the sentence recommended by a jury is within the range of punishment for that crime, it constitutes the maximum sentence a court can impose." Id Due to the fact that the record before the Court did not contain sufficient information in order to establish that the defendant was a prior offender pursuant to Sections 558.016 and 558.021, the matter was remanded. Id. Upon remand, the Court ordered that "the state shall be permitted to present whatever evidence it has of defendant's status as a prior offender. If the state presents sufficient evidence to prove beyond a reasonable doubt defendant's prior offender status, then the trial court may resentence defendant. If not, the court must grant a new trial." Id. at 683 (internal citations omitted). A similar result was rendered in State v. Franklin, 16 S.W.3d at 699.

As such, and in light of Cooper and Franklin, where a statute provides a right to a jury sentence recommendation, which would then limit the maximum sentence imposed by a Court, a defendant's due process rights are implicated. Section 557.036.5 does just that and a jury's affixing of punishment serves to limit the maximum sentence a trial court may impose; thus, the statutory right exists to have a jury determine the statutory maximum.

Authorized Dispositions and Statutory Maximums

Ms. Jaco was charged with the class A felony of Abuse of a Child pursuant to Section 568.060. V.A.M.S., § 568.060 (1997) (App. A37). The authorized term of imprisonment for

a class A felony is "a term of years not less than ten years and not to exceed thirty years, or life imprisonment." V.A.M.S., § 558.011 (2003) (App. A27).

However, Section 557.036.5 provides the true statutory maximum in this same setting, which is dependent upon the jury's verdict. That Section provides that "[i]f the jury returns a verdict of guilty in the first stage and declares a term of imprisonment in the second stage, the court shall proceed as provided in subsection 1 of this section except that any term of imprisonment imposed cannot exceed the term declared by the jury unless the term declared by the jury is less than the authorized lowest term for the offense, in which event the court cannot impose a term of imprisonment greater than the lowest term provided for the offense."

Thus, while Section 558.011 provides the maximum penalty that a jury may consider in assessing punishment, the jury's assessment, pursuant to Section 557.036.5, serves as the actual statutory maximum sentence that may be imposed by the trial court. See Hicks v. Oklahoma, 447 U.S. 343, 347 (1980) (holding that due process violation occurred when statutory right to jury sentencing violated where jury's verdict would serve as the maximum sentence the defendant could receive).

Therefore, the procedure and manner in which the jury reviews the evidence in affixing a sentence is critical so that the defendant's constitutional and statutory rights are not violated.

The Guidance Given to the Jury; The Instructions

In this case, the jury was presented five (5) instructions during the penalty phase.

Instruction Number Eleven (11) provided as follows:

At this stage of the trial, we will proceed as follows:

First, the attorneys will have an opportunity to make a statement outlining additional evidence to be presented. Such evidence may then be introduced. After that, the Court will provide you with additional instructions.

Then the attorneys may make their arguments.

You will then go to the jury room, deliberate, and arrive at your verdict.

(L.F. 173).

Instruction Number Twelve (12) provided that:

The law applicable to this stage of the trial is stated in these instructions and Instruction Nos. 1 and 2 that the Court read to you in the first stage of the trial.

In assessing and declaring the defendant's punishment, you should consider the evidence presented to you in this case, the argument of counsel, and the instructions of the Court. You may consider the evidence presented in either stage of the trial.

You will be provided with forms of verdict for your convenience.

You cannot return any verdict as the verdict of the jury unless all twelve jurors agree to it, but it should be signed by your foreperson alone.

When you have concluded your deliberations, you will complete the applicable forms to which you unanimously agree and return them together with all unused forms and the written instructions of the Court.

(L.F. 174).

Instruction Number Thirteen (13) also was given to the jury and stated that:

The attorneys will now have the opportunity of arguing the case to you regarding the punishment to be imposed. Their arguments are not evidence.

You will bear in mid that it is your duty to be governed by the evidence as you remember it, the reasonable inferences that you believe should be drawn therefrom, and the law as given in the instructions.

It is your duty, and yours alone, to render such verdict under the law and the evidence concerning the punishment to be imposed as in your reason and conscience is true and just.

The state's attorney must open the argument. The defendant's attorney may then argue the case. The state's attorney may then reply. No further argument is permitted by either side.

(L.F. 175).

However, no law or direction or level of proof was provided to the jury in examining the evidence presented during the penalty phase and the question of unanimity of evidence in aggravation remains unresolved by the instructions. As such, Ms. Jaco tendered a proposed Non-MAI instruction modeled after 313.31A and 313.44A, (L.F. 200), which stated that:

> You must unanimously find beyond a reasonable doubt that aggravating circumstances exists, taken as a whole, to impose punishment in excess of ten (10) years in the Department Corrections. If each juror finds facts and circumstances in aggravation of punishment that are sufficient to increase defendant's sentence from the ten (10) year [sic] years, then you may assess a sentence not to exceed thirty (30) years or life imprisonment.
>
> You must also determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh the facts and circumstances in aggravation of punishment. In deciding this question, you may consider all of the evidence presented in both the guilt and the punishment stages of trial.
>
> If you do not unanimously find beyond a reasonable doubt from the evidence that the facts and circumstances in aggravation of punishment warrant an increase from the ten (10) year

> sentence of punishment, or if you believe that the facts or circumstances in mitigation sufficiently outweigh the facts and circumstances in aggravation of punishment, you must return a verdict fixing defendant's punishment at ten (10) years in the Department of Corrections.

(L.F. 200). This instruction was denied by the trial court.

In light of the foregoing it is clear that no guidance as to the specific level of proof was provided to the jury in which to review the evidence presented in aggravation and/or in comparing evidence in mitigation in affixing Ms. Jaco's sentence. This lack of direction also gives rise to the likely confusion occurring during jury deliberation as to whether they must unanimously agree on any particular mitigating circumstance, which would violate the principle set forth in McKoy v. North Carolina, 110 S.Ct. 1227, 1231-1232 (1990) (holding that the unanimity requirement given to jury in considering mitigating circumstances violated Eighth Amendment because one holdout juror may cause an increase in defendant's punishment). In fact, Ms. Jaco submits that this lack of guidance directly resulted in the jury's inability to arrive at a sentence they believe to be just.

(A) Burden of Proof - Reasonable Doubt Required

If the evidence presented in the penalty phase is a fact that increases the penalty for a crime beyond the statutory maximum, then that evidence must be submitted to the jury and found beyond a reasonable doubt. Apprendi, 530 U.S. at 490. However, if the penalty phase evidence only involves sentencing factors, which do not increase the statutory maximum

penalty, then the evidence need only be found by a preponderance of the evidence. Harris, 536 U.S. at 568.

The following will assist in illustrating the difference between penalty phase evidence in Missouri and sentencing factors in Missouri. It is undisputed that the statutory authorized maximum sentence that jury may consider in this case was thirty (30) years or life in prison. However, if the jury at trial in this case would have assessed punishment at twenty (20) years, this assessment serves as the statutory maximum sentence that the trial court may impose and therefore the facts relied upon by the jury must be found beyond a reasonable doubt in accord with Apprendi. Further, any fact relied upon by the trial court in imposing and executing the sentence within the lawful range in this same scenario, in other words ten (10) years to twenty (20) years, may be found by the trial court by a preponderance of the evidence in accord with Harris and McMillan v. Pennsylvania, 477 U.S. 79 (1986).

SENTENCING FACTORS - MINIMUM PUNISHMENTS

Sentencing factors were discussed by the United States Supreme Court in McMillan. In that case, the statute in question provided a statutory minimum sentence of five (5) years if the trial court found by a preponderance of the evidence at sentencing that a defendant visibly possessed a firearm. McMillan, 477 U.S. at 81. The Court recognized that the statute did not affect the maximum sentence applicable for the crime, but rather only affected the minimum sentence that a trial court may impose. Id. at 88. In fact, the Court stated that the statute's constitutionality would be called into question "if a finding of visible possession exposed them to greater or additional punishment." Id. Ultimately the statute was upheld and the defendant's

conviction affirmed because the visible possession of a firearm was only a sentencing factor, which raised the minimum sentence, and may be found by the trial court at sentencing by a preponderance of the evidence. Id. at 91.

In Harris, the Court again addressed sentencing factors that affected the minimum sentence that a trial court may impose. In that case, the defendant's complaint was allowing the sentencing judge to find that he possessed a firearm in connection a controlled substance offense, which then results in the minimum sentence being five (5) years. 536 U.S. at 550-551. In reviewing this claim, the Court initially stated the following:

> After the accused is convicted, the judge may impose a sentence within a range provided by statute, basing it on various facts relating to the defendant and the manner in which the offense was committed. Though these facts may have a substantial impact on the sentence, they are not elements, and are thus not subject to the Constitution's indictment, jury, and proof requirements ... The statutes do not require these facts, sometimes referred to as sentencing factors, to be alleged in the indictment, submitted to the jury, or established beyond a reasonable doubt.

Id. at 549-550. The Court, by citation to Castillo v. United States, 530 U.S. 120, 126 (2000), also stated that "'[t]raditional sentencing factors often involve ... special features of the manner in which a basic crime was carried out." Id. at 553. See also Harris, 536 U.S. at 554 *citing* Castillo (stating that the numbered sections of § 924(c)(1)(A) "were added then, describing,

as sentencing factors often do, 'special features of the manner in which' the statute's 'basic crime' could be carried out"). It was also explicitly recognized that the statute only affected the minimum sentence that may be imposed and "have an effect on the defendant's sentence that is more consistent with traditional understandings about how sentencing factors operate; the required findings constrain, rather than extend, the sentencing judge's discretion." Harris, 536 at 554.

The Harris Court distinguished the holding in Apprendi because the former affected minimum sentences while the latter affected maximum sentences when it said:

> *Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime – and thus the domain of the jury – by those who framed the Bill of Rights. The same cannot be said of a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum), for the jury's verdict has authorized the judge to impose the minimum with or without the finding.

Id. at 557. Thus, facts found by the sentencing judge in affixing punishment within the authorized statutory range does not invoke the reasonable doubt requirements of the Fifth Amendment and/or the Sixth Amendment. Id. at 559.

The Court also discussed the facts that must be found beyond a reasonable doubt, which include facts essential in assessing punishment and affect the maximum penalty, when it stated

that:

> Indeed, though there is no clear record of how history treated these facts, it is clear that they did not fall within the principle by which history determined what facts were elements. That principle defined elements as 'fact[s] ... legally essential to the punishment to be inflicted.' ... This formulation includes facts that, as *McMillan* put it, '[a]lter the maximum penalty ... but it does not include facts triggering a mandatory minimum. The minimum may be imposed with or without the factual finding; the finding is by definition not 'essential' to the defendant's punishment.

Id. at 561 (internal citations omitted). History in our judicial system also supported allowing sentencing courts to impose a sentence that is authorized by the applicable statute. Id. at 565.

Ultimately, in affirming the procedure in place, while also affirming the holdings in McMillan and Apprendi, the Court stated:

> Read together, *McMillan* and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis. Within the range authorized by the jury's verdict, however, the political system may channel judicial discretion – and rely upon judicial expertise – by requiring

> defendants to serve minimum terms after judges make certain factual findings.

Id. at 567.

As stated above, Section 557.036.5 mandates that jury's recommendation serve as a maximum sentence and thus sets the "outer limits of a sentence, and [the] judicial power to impose it" and therefore is an "element of the crime for the purposes of constitutional analysis." Section 568.060 provides the minimum sentence of ten (10) years, and nothing in Section 557.036 authorizes a jury to set a minimum sentence below that range while at the same time Section 557.036 does limit the judicial power to impose a sentence beyond the jury's determination of the punishment to be inflicted.

REASONABLE DOUBT - MAXIMUM SENTENCE/AGGRAVATION

In Apprendi, 530 U.S. 468-469, the defendant entered a plea of guilty to a crime that provides a punishment range of five (5) years to ten (10) years. However, another statute provided a statutory enhancement of that range, with the new range being ten (10) years to twenty (20) years, if the trial court found by a preponderance of the evidence that the crime was racially motivated. Id. Ultimately, the trial court found that the hate-crime enhancement applied and sentenced the defendant to twelve (12) years. Id. at 471.

The United States Supreme Court stated that it is permissible for sentencing courts to exercise discretion and consider "various factors relating both to offense and offender - in imposing a judgment *within the range* prescribed by statute." Id. at 481 (emphasis in original). In fact, "[t]he historic link between verdict and judgment and the consistent limitation on

judges' discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." Id. at 482-482 (emphasis in original).

The Court echoed its previous holdings that due process and the accompanying jury protections include the finding of guilt or innocence as well as the determination of a defendant's sentence. Id. at 484. The holding in McMillan was also reaffirmed and distinguished because McMillan involved minimum sentences while the facts before the Apprendi Court involved maximum sentences. Id. at 486-487.

Ultimately, the New Jersey enhancement procedure was struck down and the Court held that:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: '[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a

reasonable doubt.

Id. at 490.

Justice Scalia's concurring opinion, that Justice Thomas joined, in this 5-4 decision is extremely enlightening as to the matters that are elements of a crime and those facts that are merely sentencing factors. Initially, Justice Scalia recognized that sentencing factors are facts that may increase a defendant's sentence and are not subject to "the constitutional protections to which elements are subject." Id. at 500. In describing the differences between "elements" of a crime and "sentencing factors", it was stated that:

> This authority establishes that a "crime" includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact – of whatever sort, including the fact of a prior conviction – the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime ... One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element.

Id. at 501. Moreover, Justice Scalia's opinion addressed the differences between judicial discretion within an applicable range and the actual determination of the applicable range in which to exercise that discretion when he stated that:

> it is one thing to consider what the Constitution requires the prosecution to do in order to entitle itself to a particular kind, degree, or range of punishment of the accused and quite another to consider what constitutional constraints apply either to the imposition of punishment within the limits of that entitlement or to a legislature's ability to set broad ranges of punishment. In answering the former constitutional question, I need not, and do not address the latter.

Id. at 520. Thus, determining the applicable sentencing range requires proof beyond a reasonable doubt while imposing a sentence within that range does not implicate constitutional protections requiring that same level of proof. Proof beyond a reasonable doubt is required in proving elements of a crime, which includes any fact that "is by law the basis for imposing or increasing punishment – for establishing or increasing the prosecution's entitlement." Id. at 521.

In Ring v. Arizona, 536 U.S. 584, 588 (2002), the Court was confronted with the Arizona death penalty scheme that allowed a judge alone to determine whether aggravating circumstances exist that warrant the imposition of an increased sentence, which in this context was death. In overruling this Arizona procedure and Walton v. Arizona, 497 U.S. 639 (1990),

the Court relied heavily upon Apprendi. The Ring Court echoed the holding of Apprendi and stated that a defendant's right to proof beyond a reasonable doubt included the jury's finding of an aggravating circumstance. 536 U.S. at 602. In fact, the Court stated that the primary focus is upon the procedure's effect and "[i]f a State makes an increase in a defendant's authorized punishment contingent on the findings of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." Id.

The decision in Ring was supported by seven (7) justices agreeing to the ultimate holding, with Justice Scalia filing a concurring opinion that Justice Thomas joined, Justice Kennedy filing a concurring opinion and Justice Breyer filing an opinion concurring in the judgment. Id. at 587. It must be noted that Justice Breyer and Justice Kennedy, although concurring in Ring dissented in Apprendi. Apprendi, 530 U.S. at 468. Thus, the decision in Ring despite the apparent seven (7) to two (2) decision was truly much closer than it appears at first blush. See Ring, 536 U.S. at 613 *Scalia concurring* ("There is really no way in which Justice BREYER can travel with the happy band that reaches today's result unless he says yes to *Apprendi*. Concisely put, Justice BREYER is on the wrong flight; he should either get off before the doors close, or buy a ticket to *Apprendi*-land").

Justice Scalia's concurring opinion recognized "that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt." Ring, 536 U.S. at 610. Justice Scalia also explained the two (2) grounds for his

opinion and ultimately stated that "*whether or not* the States have been erroneously coerced into the adoption of 'aggravating factors,' wherever those factors exist they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution, in criminal cases: they must be found by the jury beyond a reasonable doubt." Id. at 612.

It cannot be readily contested that Section 557.036 permits evidence in aggravation of punishment. Moreover, and once again, Section 557.036.5 mandates that jury's recommendation serve as a maximum sentence and thereby limits the sentencing court's power in imposing a sentence. Certainly the State will be permitted to introduce evidence of prior convictions as a fact in aggravation of the sentence relying upon the defendant's history and character provision. Thus, in accord with Apprendi, any aggravating fact submitted during the penalty phase is properly considered elements of the crime that must be submitted to the jury and found beyond a reasonable doubt, which was not done here. See Apprendi, 530 U.S. at 501 *Justice Scalia concurring* (stating that "if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact - of whatever sort, including the fact of a prior conviction - the core crime and the aggravating fact together constitute an aggravated crime ... The aggravating fact is an element of the aggravated crime").

Further guidance may be received by other similar procedures in other states. For example, in Texas, like Missouri, a criminal defendant possesses a statutory right to jury sentencing. Washington v. State, 677 S.W.2d 524, 527 (Tex. Cr. App. 1984). The Texas

statute governing the penalty phase provides that:

> Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried ... any other evidence of an extraneous crime or bad act that is **shown beyond a reasonable doubt** by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act.

Tex. Code. Crim. P. Ann., art. 37.07, § 3 (a) (1) (2001) (emphasis added) (App. A6); *Cf*. State v. Debler, 856 S.W.2d 641, 657 (Mo. 1993) (stating that "[a] review of Missouri's death-penalty cases reveals that serious unconvicted crimes – including crimes for which the conviction is not yet final – are routinely submitted as nonstatutory aggravating circumstances"). In fact, in Texas it is reversible error for a trial court not to instruct *sua sponte* the jury that the evidence of prior bad acts must be established beyond a reasonable doubt. Webber v. State, 21 S.W.3d 726, 731 (Tex. App. - Austin 2000).

What is notable is that the Texas procedure does not permit judge sentencing and in the

event that a jury deadlocks in affixing punishment "a mistrial shall be declared, the jury shall be discharged, and no jeopardy shall attach." Tex. Code Crim. P. Ann., 37.07 § 3 (c).

In Kentucky, the statutes apparently call for no burden of proof during the penalty phase. However, there are several dramatic differences from the Missouri procedure. First, apparently the prosecuting attorney is not permitted to introduce evidence of character or reputation. Ky. Rev. Stat. Ann., § 532.055 (1998) (A4). Further, unlike Missouri, the statute provides a list of factors/types of evidence the Commonwealth may offer. Id. It is only the defendant, through his introduction of mitigation evidence or in support of leniency that may open the flood gates to this other type of character or reputation evidence. Robinson v. Commonwealth, 926 S.W.2d 853, 854 (Ky. 1996). Also, and most importantly, the sentencing court is not bound by the jury's recommendation and thus the protections set forth in Apprendi are not implicated. Murphy v. Commonwealth, 50 S.W.3d 173, 178 (Ky. 2001) (stating that "KRS 532.055 does not impose a duty upon the trial court to accept the recommendation of the jury as to sentencing. The jury's recommendation is only that, and has no mandatory effect"). (internal citations omitted).

In Virginia, the prosecuting attorney in its case-in-chief may only present evidence of the "defendant's prior criminal convictions by certified, attested or exemplified copies of the record of conviction, including adult convictions and juvenile convictions and adjudications of delinquency." Va. Code Ann., § 19.2-295.1 (2001) (A10). Following this presentation, the defendant may then introduce evidence in mitigation. Id. If the defendant presents evidence in mitigation, only then is the prosecuting attorney authorized to offer additional evidence in

rebuttal. Id.

Thus, in Virginia the only evidence in aggravation that the prosecuting attorney may present is that of prior convictions that must be done in a manner that resolves doubt as to their authenticity. See Pughsley v. Commonwealth, 536 S.E.2d 447, 449 (Va. App. 2000) (stating, in citation to § 19.2-295.1 that "'[a]fter the Commonwealth has introduced such evidence of prior convictions, or if no such evidence is introduced, the defendant may introduce relevant, admissible evidence related to punishment. Nothing in ... [the statute] shall prevent the Commonwealth or the defendant from introducing relevant, admissible evidence in rebuttal.' However, 'this is not a one-way street extending only in the defendant's direction. The statute also permits the Commonwealth to introduce 'relevant, admissible evidence in rebuttal' to that offered by the defendant.'") (internal citations omitted).

As the Apprendi Court held, the only aggravating evidence that need not be submitted to a jury and found beyond a reasonable doubt is that of a prior conviction. Also, it is clear from Apprendi and Ring that the reasonable doubt standard is inapplicable to evidence in mitigation or in rebuttal thereto.

In Missouri, the jury's recommended sentence serves as the statutory sentence maximum that a trial court may impose; yet, no burden of proof is currently provided to the jury by law or instruction. *Cf*. Debler, 856 S.W.2d at 657 (holding that extensive uncharged/unconvicted conduct used in aggravation during the capital penalty phase requires an instruction that the jury must unanimously find beyond a reasonable doubt that the defendant was criminally liable for that same uncharged conduct and failure to instruct the jury

constituted plain error and resulted in manifest injustice).

In Texas, a burden of proof is required, which is beyond a reasonable doubt for certain evidence in aggravation. Further, and similar to Missouri, the defendant has a right to jury sentencing. In fact, in Texas the defendant possesses an absolute right to jury sentencing and the trial court may not impose a sentence even if a deadlock occurs and, in fact, no jeopardy attaches and the guilt phase must begin again.

No burden of proof is necessary in Kentucky during the penalty phase for evidence in aggravation. However, in Kentucky, and unlike Missouri, the jury's recommendation is only a non-binding recommendation to the sentencing judge. Thus, the jury's recommendation does not limit the sentencing court's ability to impose a sentence so no burden of proof is constitutionally required.

In Virginia, the only evidence in aggravation that the prosecuting attorney may present is that of prior convictions, which must done in such a form that resolve all doubts. However, the defendant may then present evidence in mitigation, which Apprendi holds, does not require proof beyond a reasonable doubt.

The current procedure set forth in Section 557.036 is unconstitutional, which may be cured easily be another amendment. For example, if the legislature were to limit the evidence offered in aggravation to that of prior convictions, the statutory scheme is appropriate, but would at the same time remove the procedure from bifurcation according to the mandates set forth in that same statute authorizing judge sentencing. In the alternative, if the statute were to require that evidence in aggravation be proved beyond a reasonable doubt this would satisfy

the constitutional concerns. Further in the alternative, provide for a procedure similar to Texas where an individual possesses an absolute right to jury sentencing with the reasonable doubt standard imposed for un-adjudicated conduct. These are merely suggestions, and are not all encompassing, in which to serve the interests of all involved yet satisfy the constitutional protections afforded to each and every individual that may be called, unfortunately, a "defendant."

In short, Section 557.036 is constitutionally lacking.

(B) Notice of Evidence in Aggravation Must Be Required

Unlike Section 565.030, which governs the penalty phase in a bifurcated first degree murder trial, Section 557.036 provides no firm guidance as to what evidence may be considered in aggravation or what evidence may be considered in mitigation. In fact, the applicable procedural rules and evidentiary rules, other than within the discretion of the trial court, are also not set forth by the statute. See V.A.M.S., § 565.030.4 (stating that this penalty phase evidence "may be presented subject to the rules of evidence at criminal trials"). Lastly, a criminal defendant has no statutory authority on which to rely in order to compel the disclosure of evidence that will be introduced by the State in aggravation during the penalty phase. See V.A.M.S., § 565.005.1 (1983) and State v. Mallett, 732 S.W.2d 527, 537 (Mo. 1987) (holding that failure to request evidence in aggravation in compliance with the statutory provisions resulted in a waiver of entitlement to same). As such, in light of the waiver recognized in Mallett, it does appear that Missouri Supreme Court Rule 25.03, (App. A12), mandating disclosure by the State, does not govern disclosure of evidence used in the penalty

phase of a bifurcated trial.

Further, Section 557.036 merely provides that the evidence may include "evidence **concerning** the impact of the crime upon the victim, the victim's family and others, the nature and circumstances of the offense, and the history and character of the defendant." In other words, there is no direction provided by the statute that confines the potential penalty phase evidence within certain limits. Moreover, such a wide range of evidence including otherwise impermissible character evidence during the State's case-in-chief, which is not subject to pretrial disclosure, can result in a defendant being subjected to trial by ambush and/or excessive punishment merely because the victim is likeable and/or the defendant is unlikeable.

Once again, Ms. Jaco suggests that a review of procedures in other states may be of assistance. In Texas, Article 37.07, § 3 (g), provides an avenue for obtaining penalty phase evidence by allowing the defendant to request same prior to trial. In fact, if a timely request is made the State must set forth in its response its notice of intent to use, including any dates and locations where a purported uncharged crime occurred and the named victim of that uncharged act. Tex. Code Crim. P. Ann., art. 37.07, § 3 (g). In Chimney v. State, 6 S.W.3d 681, 693-694 (Tex.App.–Waco 1999), the Court, in quoting other holdings, stated that "'[t]he purpose of article 37.07, section 3(g) is to avoid unfair surprise, that is, trial by ambush.' 'In other words, the purpose is to allow the defendant adequate time to prepare for the State's introduction of the [evidence] at trial.'" Moreover, this notice protection also "requires the State to give notice of any character evidence it intends to offer during the punishment phase of trial '[o]n timely request of the defendant.'" Id. at 698.

In Virginia, § 19.2-295.1 mandates that the prosecuting attorney "shall provide to the defendant fourteen days prior to trial notice of its intention to introduce evidence of the defendant's prior criminal convictions. Such notice shall include (i) the date of each prior conviction, (ii) the name and jurisdiction of the court where each prior conviction was had, and (iii) each offense of which he was convicted. Prior to commencement of trial, the Commonwealth shall provide to the defendant photocopies of certified copies of the defendant's prior criminal convictions which it intends to introduce at sentencing." Va. Code Ann., § 19.2-295.1.

It cannot be readily contested that there is no absolute right to discovery in criminal cases. State v. Wood, 719 S.W.2d 756, 759 (Mo. 1986). Thus, any discovery that must be provided to a criminal defendant must fall within the confines of Missouri Supreme Court Rule 25. Id. However, this general rule must give way to the Due Process requirements set forth in the United States and Missouri Constitution and must be disclosed "where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." State v. Weaver, 912 S.W.2d 499, 514 (Mo. 1995) *citing* Brady v. Maryland, 373 U.S. 83, 87 (1963).

This is where the deficiency arises according to the statute's procedure.

The same disclosure requirements that are in place in other jurisdictions that are arguably similar to Missouri's procedure do not come into play and Missouri Supreme Court Rule 25.03 does not serve to save this obvious deficiency. See State v. Spencer, 50 S.W.3d 869, 878 (Mo. Ct. App. 2001) (holding that Missouri Supreme Court Rule 25.03 does not

require disclosure of defendant's prior convictions); State v. Wood, 719 S.W.2d at 759 (holding that State need not disclose intent to use other crimes evidence against defendant because it is beyond the scope of Rule 25.03).

In light of the new bifurcation in allowing a jury to affix a sentence, and the obvious limitations that are in place in Rule 25.03, without some form of statutory protection, evidence that "is material ... to ... punishment" is not subject to general disclosure in violation of the United States and Missouri Constitution, which is recognized by Weaver and Brady.

(C) Character Evidence/Uncharged Conduct

The general rule in Missouri is that "[e]vidence of uncharged crimes or bad acts is generally inadmissible to show the bad character or the propensity of a defendant to commit the charged crime." State v. Beal, 966 S.W.2d 9, 13 (Mo. Ct. App. 1997). However, bad character evidence is admissible "where a defendant first places his character in issue." Id. at 14; See also State v. Farmer, 130 S.W.2d 572, 575 (Mo. 1939) (holding that "[t]he defendant did not testify at the trial and did not put his character in issue. The state, therefore, had no right to assail his character by offering evidence tending to show that it was bad, and such, we think, was the tendency of Scully's testimony").

Unfortunately, this general rule is now removed during the penalty phase and Section 557.036 condones the State's introducing evidence of "the history and character of the defendant." In fact, the Debler Court, in the context of death penalty cases, condoned the use of unconvicted/uncharged crimes for use by the State during the penalty phase as character evidence. 856 S.W.2d at 657. This type of evidence is also permitted in that same context to

rebut a claim of no prior criminal activity. Id. fn. 2. However, Debler did recognize the potential problem in allowing this type of evidence when it stated that:

> Because no jury or judge has previously determined a defendant's guilt for uncharged criminal activity, such evidence is significantly less reliable than evidence related to prior convictions. To the average juror, however, unconvicted criminal activity is practically indistinguishable from criminal activity resulting in convictions, and a different species from other character evidence.

Id. at 657. Ultimately, the Debler Court held that extensive admission during the penalty phase of uncharged conduct, when the conduct is not found beyond a reasonable doubt, resulted in plain error and a manifest injustice. Id.

The concerns stated by the Debler Court hold equally true to the procedure set forth in Section 557.036. The amended statute permits the introduction of the defendant's history and character, which likely includes uncharged conduct. As set forth above, the jury is provided no guidance as to the proper burden of proof, and the absence of this information renders the current procedure constitutionally infirm resulting in manifest injustice.

(D) Right to a Jury Trial, Due Process and Jury Sentence Invaded By The Legislature

Section 557.036 was amended by the Missouri Legislature shortly before trial commenced in this matter. The trial proceeded in accord with the amended statute over Ms. Jaco's objection. This legislatively mandated jury trial procedure infringed upon Ms. Jaco's

right to a jury trial and her due process rights when the legislature violated the separation of powers doctrine.

Article II, § 1 of the Missouri Constitution provides that:

> The powers of government shall be divided into three distinct departments – the legislative, executive and judicial – each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

Article V, § 5 of the Missouri Constitution provides that:

> The supreme court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended in whole or in part by a law limited to the purpose.

In fact, it is Article V, § 5 that gives rise to the recognition that "[t]hese rules take

precedence over any contradictory statutes in procedural matters, unless the legislature specifically annuls or amends the rules in a bill limited to that purpose." State ex rel. Kinsky v. Pratte, 994 S.W.2d 74, 75 (Mo. Ct. App. 1999).

Thus, the first question that must answered is whether Section 557.036 is a procedural change that is within the province of the judicial branch.

Section 1.160 provides that:

> No offense committed and no fine, penalty or forfeiture incurred, or prosecution commenced or pending previous to or at the time when any statutory provision is repealed or amended, shall be affected by the repeal or amendment, but the trial and punishment of all such offenses, and the recovery of the fines, penalties or forfeitures shall be had, in all respects, as if the provision had not been repealed or amended, except:
>
> (1) That all such proceedings shall be conducted according to existing procedural laws; and
>
> (2) That if the penalty or punishment for any offense is reduced or lessened by an alteration of the law creating the offense prior to original sentencing, the penalty or punishment shall be assessed according to the amendatory law.

Ms. Jaco's case was pending on the date Section 557.036 was amended, which altered the order in which her jury trial proceeded. As such, in light of Section 1.160, it does appear that

the amended statute is procedural in nature. See Wilkes v. Missouri Highway and Transportation Commission, 762 S.W.2d 27, 28 (Mo. 1988) (stating that "[p]rocedural law prescribes a method of enforcing rights or obtaining redress for their invasion; substantive law creates, defines and regulates rights; the distinction between substantive law and procedural law is that substantive law relates to the rights and duties giving rise to the cause of action, while procedural law is the machinery used for carrying on the suit"). In fact, if Section 557.036 is not procedural in nature, then the manner in which the trial proceeded violated Section 1.160, which is set forth in Issue IV as an alternate argument.

The next question that must be answered is whether a Missouri Supreme Court Rule existed describing the procedure of a jury trial that is in conflict with Section 557.036. Missouri Supreme Court Rule 27.02 governs and regulates the order of a felony jury trial, and does not include any "second stage proceedings" other than those in death penalty cases. V.A.M.R. 27.02 (1990) (App. A14). Also, Missouri Supreme Court Rule 29.02 addresses a jury's affixing of punishment in their verdict. V.A.M.R. 29.02 (1980) (App. A18). Rule 29.03 authorizes a trial court to assess punishment if a jury deadlocks in making that same assessment. V.A.M.R. 29.03 (1980) (App. A19). Rule 29.04, Rule 29.05 and Rule 29.06 also address the imposition of a defendant's sentence and the roles in which the Court and jury fulfill. V.A.M.R. 29.04 (1980) (App. A20); V.A.M.R. 29.05 (1980) (App. A21); V.A.M.R. 29.06 (1980) (App. A22). Thus, it does appear that Missouri Supreme Court Rules did exist that involved the same procedural matters addressed in Section 557.036.

In light of the existence of Supreme Court Rules, the last question that must be resolved

is whether the Missouri Legislature properly enacted Section 557.036 by specifically amending the applicable Missouri Supreme Court Rules. Ms. Jaco does not contest that the Legislature possesses the ability in which to annul or amend procedural matters regulated by Missouri Supreme Court Rules. Mo. Const., art. V, § 5. However, the legislature must be specific in its annulment or amendment of the rule through "a bill limited to that purpose." State ex rel. Kinsky v. Pratte, 994 S.W.2d at 75.

Senate Bill Number 5 repealed the version of Section 557.036 in place at the time Ms. Jaco's case was pending. The truly agreed to and finally passed version of that bill provided that it was an act:

> To repeal sections 56.807, 84.570, 217.362, 217.750, 217.760, 478.610, 513.653, 556.061, 557.036, 558.011, 558.016, 558.019, 559.026, 559.115, 565.081, 565.082, 565.083, 568.045, 570.030, 570.040, 571.030, 589.400, 589.407, 589.414, and 595.209, RSMo, and to enact in lieu thereof twenty-eight new sections relating to crime, with penalty provisions and an emergency clause.

(App. A39). What is noticeably absent from that bill is any reference to any Missouri Supreme Court Rule or any reference to criminal procedure.

The Court in State ex rel. K.C. v. Gant, 661 S.W.2d 483 (Mo. 1983), was confronted with a similar situation. In that case, a Missouri Supreme Court Rule entitled a party to a hearing before a judge of the juvenile court following a hearing before a commissioner. Id.

at 484. However, an amended statute diminished that right to a hearing and allowed the judge to exercise his discretion and deny the party's request for hearing. Id. Thus, the primary issue was whether the party was entitled to hearing as provided for in the Rule or whether the judge possessed discretion to deny that request as provided for in the statute. Id.

The Gant Court initially recognized that the purpose of Article V, § 5 was "to relieve the legislature of the burden of continuous surveillance of details of judicial procedure, while preserving its ultimate authority through the power to amend or annul any rule adopted by the Court by means of 'a law limited to the purpose.'" Id. at 485. In striking down the amended statute, the Court stated that:

> The constitutional prescription of the manner in which the General Assembly must act is of pristine importance. It is essential that the bench, the bar, and the public be clearly advised as to the procedural rules that are actually in effect at a given time. The rules are compiled and published, officially and privately, so all may read. There would be substantial problems if a concerned person could not rely on a rule of court duly enacted and not expressly repealed or modified. That is why the Constitution specifies the formalities which the General Assembly must follow in order to annul or amend a rule. **A law, to qualify as one "limited to the purpose" of amending or annulling a rule, must refer expressly to the rule**. Nothing

> less will suffice. In so holding, we do not limit or constrict the power of the General Assembly. Its power is plenary, so long as it follows the constitutional procedure.

Id. (emphasis added).

The Gant decision was relied upon by the Court in Schleeper v. State, 982 S.W.2d 252 (Mo. 1998). In that case, the issue before the Court was whether Section 547.360 allows a defendant to file a second motion for post-conviction relief. Id. at 253. The Court recognized that Rule 29.15 governs the post-conviction relief procedure. Id. In holding that the Section 547.360 did not serve to annul or amend Rule 29.15, the Court stated that:

> Rules of procedure adopted by this Court may be amended or annulled by the legislature through a "law limited to that purpose." "A law, to qualify as one 'limited to the purpose' of amending or annulling a rule, must refer expressly to the rule." The bill enacting section 547.360 does not expressly refer to the rule by number or otherwise. Nor does it provide, in any terms, that its purpose is to amend or annul the rule ... Instead, it is one of several statutes included in Senate Bill 56 entitled "AN ACT to repeal sections 547.200, 552.020, 556.036, 566.617, and 568.060, RSMo 1994, relating to court procedure, and to enact in lieu thereof twenty-one new sections relating to the same subject, with penalty provisions."

Id. at 254. (internal citations omitted).

Thus, as the holdings of Gant and Schleeper dictate, the General Assembly's enactment of Section 557.036 violated Article II, § 1 and Article V, § 5, which then in turn violated Ms. Jaco's rights guaranteed to her by United States Constitution and Missouri Constitution to Due Process and/or a fair jury trial. Hicks v. Oklahoma, 447 U.S. 343, 346 (1980) (stating that "[w]here, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will not be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion ... and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State"). (internal citations omitted).

Conclusion

In light of the foregoing, Section 557.036 must be held unconstitutional, and that Ms. Jaco's case be remanded for a new trial. V.A.M.S., § 1.150 (1957) (App. A23); Cooper, 16 S.W.3d at 683.

IV. THE TRIAL COURT COMMITTED PREJUDICIAL REVERSIBLE ERROR IN BIFURCATING THE TRIAL PROCEEDING INTO A GUILT PHASE AND A PENALTY PHASE IN RELIANCE UPON SECTION 557.036 BECAUSE THE AMENDMENT TO SECTION 557.036 WAS NOT PROCEDURAL IN NATURE AND ERROR WAS PRESENT IN THAT SECTION 1.160 MANDATES, IN PART, THAT A PENDING CRIMINAL TRIAL SHALL PROCEED AS THOUGH NO STATUTORY AMENDMENT TOOK PLACE WHEN THE AMENDMENT DOES NOT INVOLVE PROCEDURAL CHANGES OR LESSENS THE APPLICABLE PUNISHMENT AND THE TRIAL COURT'S PROCEEDING IN ACCORD WITH THE NEWLY ENACTED SECTION 557.036 VIOLATED THE PROTECTIONS GUARANTEED TO DEFENDANT BY THE FIFTH AMENDMENT, SIXTH AMENDMENT, EIGHTH AMENDMENT AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND/OR ARTICLE I, SECTION 10, ARTICLE I, SECTION 21 OF THE MISSOURI CONSTITUTION.

In the event that the Court disagrees with Ms. Jaco's assertion that the amendment to Section 557.036 was not procedural, and therefore did not violate the separation of powers doctrine, Ms. Jaco then submits that the trial court's bifurcation of the trial violated Section 1.160 of the Missouri Statutes.

Standard of Review

The appropriate standard of review in reviewing whether Section 1.160 was violated by proceeding in the manner set forth in 557.036 is de novo because it involves simply a question

of law. State v. Gentry, 936 S.W.2d 790, 792 (Mo. 1996).

Due Process and Jury Trial

The Fifth Amendment of the United States Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ... nor be deprived of life, liberty, or property, without due process of law." U.S.C.A., *Const. Amend. V.* The Fourteenth Amendment of the United States Constitution provides that " [n]o State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S.C.A. *Const. Amend. XIV.*

The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor." U.S.C.A. *Const. Amend. VI.* Article I, § 10 of the Missouri Constitution provides "[t]hat no person shall be deprived of life, liberty or property without due process of law." Mo. Const. art. I, § 10. Article I, § 18(a) provides that a criminal defendant possesses a constitutional right to a jury trial. Mo. Const., art. I, § 18(a).

Section 1.160

Section 1.160 provides that:

> No offense committed and no fine, penalty or forfeiture incurred, or prosecution commenced or pending previous to or at the time when any statutory provision is repealed or amended, shall be

> affected by the repeal or amendment, but the trial and punishment of all such offenses, and the recovery of the fines, penalties or forfeitures shall be had, in all respects, as if the provision had not been repealed or amended, except:
>
> (1) That all such proceedings shall be conducted according to existing procedural laws; and
>
> (2) That if the penalty or punishment for any offense is reduced or lessened by an alteration of the law creating the offense prior to original sentencing, the penalty or punishment shall be assessed according to the amendatory law.

V.A.M.S., § 1.160 (1957) (App. A24).

Thus, if the amendment to Section 557.036 is not procedural, the Ms. Jaco's trial should have proceeded as though no amendment to the statute occurred, which then would have avoided the bifurcation of the proceedings. Bifurcation did occur and therefore Section 1.160 was violated if the amended statute was not procedural.

Prior to the amendment, Section 557.036 provided in pertinent part that "[t]he court shall instruct the jury as to the range of punishment authorized by statute and upon a finding of guilt to assess and declare the punishment as a part of their verdict." V.A.M.S., § 557.036.2 (now repealed). This provision did not authorize the introduction of any evidence in aggravation for the jury's consideration, which is now authorized by the amended statute.

Ms. Jaco's Trial Proceedings

It cannot be readily contested that Ms. Jaco's case was pending before the trial court at the time Section 557.036 was amended in June of 2003. Moreover, it cannot be readily contested that the trial court did, in fact, bifurcate the proceedings over Ms. Jaco's objection. If the amendment is not procedural, Section 1.160 prohibits the bifurcation. If the amendment was procedural, the statute is unconstitutional as set forth in Issue III, and this point relied on is without merit.

As previously stated in this brief, Ms. Jaco possessed a statutory right to jury sentencing. State v. Franklin, 16 S.W.3d 692, 698 (Mo. Ct. App. 2000). The now repealed Section 557.036 also provided that the jury's assessment of punishment would limit the maximum sentence the sentencing court may then impose, and thus even before the amendment possessed a right to jury sentencing. Moreover, a statutory right to jury sentencing and the manner in which same occurs implicates the protections set forth in Fifth, Sixth and Fourteenth Amendments to the United States Constitution and the mirroring protections provided in the Missouri Constitution. See Apprendi v. New Jersey, 530 U.S. 466 (2000); Hicks v. Oklahoma, 447 U.S. 343, 347 (1980). In an effort to avoid rebriefing the constitutional implications involved in jury sentencing, Ms. Jaco will simply incorporate her arguments set forth in Issue III, including, but not limited to, the subsections involving the burden of proof, notice and character evidence.[1]

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[1] This issue presented is an alternate argument offered by Ms. Jaco when comparing the argument advanced in Issue III, the effect on her constitutional rights by the General Assembly violating the separation of powers doctrine. While, this argument may

Therefore, Ms. Jaco's constitutional rights to due process and a jury trial and her statutory right to jury sentencing were violated by the trial court's bifurcating the trial despite the fact that Section 1.160 prohibited said bifurcation because any amendment to Section 557.036 was not procedural in nature. In light of the foregoing, Section 1.160 was violated and that Ms. Jaco's sentence of twenty (20) years must be reduced to the statutory minimum of ten (10) years. Hicks, 447 U.S. 343.

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be best presented within Issue III as an alternative argument Missouri Supreme Court Rule 84.04 (d) prevents her from doing so. As such, Ms. Jaco desires to incorporate her prior arguments, rather than restating those arguments in full.

V. THE TRIAL COURT COMMITTED PREJUDICIAL REVERSIBLE ERROR WHEN IT REFUSED DEFENDANT'S PROPOSED NON-MAI INSTRUCTION NUMBER A BECAUSE NO OTHER INSTRUCTION WAS PROVIDED TO THE JURY ADDRESSING ANY BURDEN OF PROOF THAT THE JURY MUST EMPLOY IN CONSIDERING EVIDENCE PRESENTED BY THE STATE IN AGGRAVATION OF PUNISHMENT AND THUS THE JURY WAS PROVIDED NO GUIDANCE WHATSOEVER IN WEIGHING THE EVIDENCE IN AFFIXING PUNISHMENT IN THAT THE UNITED STATES CONSTITUTION AND THE MISSOURI CONSTITUTION, AS WELL AS THE UNITED STATES SUPREME COURT HOLDINGS, REQUIRE THAT EVIDENCE IN AGGRAVATION WHICH INCREASES THE MAXIMUM PUNISHMENT THAT MAY BE AFFIXED BY THE JURY AND/OR SENTENCING COURT MUST BE FOUND BEYOND A REASONABLE DOUBT AND THEREFORE THIS ERROR VIOLATED THE PROTECTIONS GUARANTEED TO DEFENDANT BY THE FIFTH AMENDMENT, SIXTH AMENDMENT, EIGHTH AMENDMENT AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND/OR ARTICLE I, SECTION 10, ARTICLE I, SECTION 21 OF THE MISSOURI CONSTITUTION.

The next issue presented to this Court for determination is whether reversible error occurred when the trial court refused Ms. Jaco's tendered non-MAI instruction number A. Ms. Jaco states that error did, in fact, occur, and her sentence of twenty (20) years must be set

aside and held for naught and that her sentence be reduced to the statutory minimum of ten (10) years.

Standard of Review

"The giving or failure to give an instruction or verdict form in violation of this Rule 28.02 or any applicable Notes on Use shall constitute error, the error's prejudicial effect to be judicially determined, provided that objection has been timely made pursuant to Rule 28.03." V.A.M.R. 28.02(f) (App. A16).

In reviewing the prejudicial effect, it is Ms. Jaco's position that this Court must find prejudicial error unless it can be determined that the failure to give this instruction was harmless beyond a reasonable doubt. Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986); Olden v. Kentucky, 488 U.S. 227, 233 (1988); State v. Driscoll, 55 S.W.3d 350, 356 (Mo. 2001) *citing* Neder v. United States, 527 U.S. 1, 15-16 (1999). Also, instructional error is presumed prejudicial. State v. Roe, 6 S.W.2d 411, 415 (Mo. Ct. App. 1999); State v. Pasteur, 9 S.W.3d 689, 696 (Mo. Ct. App. 2000) (providing that "[a] verdict directing instruction must set forth all of the facts necessary to constitute the charged offense and must be supported by the evidence ... A faulty instruction, one that fails to conform to the elements of the offense and for which a defendant suffers prejudice, is grounds for reversal")

Due Process, Jury Trial, Excessive Punishments and Separation of Powers

The Fifth Amendment of the United States Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ... nor be deprived of life, liberty, or property, without due process

of law." U.S.C.A., *Const. Amend. V.* The Fourteenth Amendment of the United States Constitution provides that " [n]o State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S.C.A. *Const. Amend. XIV.* The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor." U.S.C.A. *Const. Amend. IV.* The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S.C.A., *Const. Amend. VIII.*

Article I, § 10 of the Missouri Constitution provides "[t]hat no person shall be deprived of life, liberty or property without due process of law." Mo. Const. art. I, § 10. Article I, § 18(a) provides that a criminal defendant possesses a constitutional right to a jury trial. Mo. Const., art. I, § 18(a). Article I, § 20 provides "[t]hat excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." Mo. Const., art. I, § 20.

Jury Sentencing

Ms. Jaco already, in Issue III, fully argued her statutory right to jury sentencing. State v. Hunter, 840 S.W.2d 850, 863 (Mo. 1992); State v. Franklin, 16 S.W.3d 692, 698 (Mo. Ct. App. 2000). Also, Ms. Jaco fully briefed the United States Supreme Court holding in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), which held that the Constitution requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime

beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." However, if the evidence involves only a sentencing factor that evidence need only be established by a preponderance of the evidence and may be found by the trial court. Harris v. United States, 536 U.S. 545, 568 (2002).

Rather than simply reargue the law previously cited, including the statutory jury verdict maximum, Ms. Jaco simply incorporates those arguments set forth in Issue III.[2]

The Lack of Guidance Given to the Jury

It is notable that no instruction presented to the jury addressed any burden of proof when considering evidence presented in aggravation of punishment. The absence of such an instruction resulted in Ms. Jaco tendering a proposed Non-MAI instruction modeled after 313.31A and 313.44A, (L.F. 200), which stated that:

> You must unanimously find beyond a reasonable doubt that aggravating circumstances exists, taken as a whole, to impose punishment in excess of ten (10) years in the Department

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[2] It does appear that this instructional issue is part and parcel of Issue III, wherein Ms. Jaco discussed the constitutionality of Section 557.036 and the failure to prescribe a burden of proof, Missouri Supreme Court Rule 84.04 (d) must be recognized and therefore a separate point relied on is offered. As such, Ms. Jaco incorporates her prior arguments, rather than restating those arguments in full and belaboring this Court with additional verbiage that would result in nothing more than a basic word processing "cut-and-paste."

Corrections. If each juror finds facts and circumstances in aggravation of punishment that are sufficient to increase defendant's sentence from the ten (10) year [sic] years, then you may assess a sentence not to exceed thirty (30) years or life imprisonment.

You must also determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh the facts and circumstances in aggravation of punishment. In deciding this question, you may consider all of the evidence presented in both the guilt and the punishment stages of trial.

If you do not unanimously find beyond a reasonable doubt from the evidence that the facts and circumstances in aggravation of punishment warrant an increase from the ten (10) year sentence of punishment, or if you believe that the facts or circumstances in mitigation sufficiently outweigh the facts and circumstances in aggravation of punishment, you must return a verdict fixing defendant's punishment at ten (10) years in the Department of Corrections.

(L.F. 200). This instruction was denied by the trial court.

Ultimately, the jury deadlocked as to the appropriate sentence and the trial court

sentenced Ms. Jaco to twenty (20) years in prison.

Ms. Jaco, once again, in Issue III, fully briefed her position that proof beyond a reasonable doubt is required and the jury must be so instructed when considering evidence that increases a criminal defendant's maximum punishment as compared to a sentencing factor that only requires proof by a preponderance of the evidence. Once again, Ms. Jaco simply incorporates those same arguments herein for this Court's review.

However, as an example, the Missouri Supreme Court's prior decision in Debler must be highlighted where it discussed the fact that uncharged conduct is regularly submitted as evidence in aggravation and that a reasonable doubt instruction is required when such evidence is extensive. Debler, 856 S.W.2d 641, 657 (Mo. 1993) (holding that extensive uncharged/unconvicted conduct used in aggravation during the capital penalty phase requires an instruction that the jury must unanimously find beyond a reasonable doubt that the defendant was criminally liable for that same uncharged conduct and failure to instruct the jury resulted in plain error and constituted manifest injustice).

In light of the United States Supreme Court holdings in Apprendi and Ring, Ms. Jaco submits that evidence in aggravation of punishment must be found beyond a reasonable doubt. The jury was not provided with an instruction setting forth this level of proof, and therefore prejudicial error occurred when the trial court refused Ms. Jaco's tendered instruction. The jury's failure to agree on a sentence highlighted this confusion and prejudice followed by the trial court imposing a sentence that exceeded the statutory minimum of ten (10) years. Thus, this Court must set aside the current sentence in place and impose a sentence of ten (10) years

in this matter.

CONCLUSION

In light of the foregoing, Ms. Jaco's conviction must be set aside and held for naught and this matter remanded for a new trial in that the prejudicial error occurred when the trial court refused Ms. Jaco's request to present Exhibit J and introduce evidence of scientific studies. The trial court's refusal violated Ms. Jaco's constitutional rights, including, but not limited to, her right to a fair jury trial, due process and the right of confrontation.

Further, this Court must find that Section 557.036 is facially unconstitutional and mandate that Ms. Jaco's case be remanded for a new trial.

In the event that a new trial is not granted for the above reasons, her sentence must be reduced to the statutory minimum of ten (10) years due to the violation of Section 1.160 and the trial court's refusal to provide Instruction Number A to the jury.

SIGNATURE BLOCK

Respectfully submitted,

TERRY J. FLANAGAN, P.C.

Terry J. Flanagan, #21648
John W. Peel, #49637
Attorneys for Appellant
133 S. 11th St., Suite 350
St. Louis, Missouri 63102
Ph.: (314) 621-3743
Fax: (314) 231-9552

CERTIFICATE OF COMPLIANCE AND CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 1st day of June, 2004, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to the Office of Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

The undersigned further hereby certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06, and the brief contains 29,743 words.

The undersigned also hereby certifies that the labeled disk, simultaneously filed with the hard copies of the brief, was scanned for viruses and is virus free.

Respectfully submitted,

TERRY J. FLANAGAN, P.C.

Terry J. Flanagan, #21648
John W. Peel, #49637
Attorneys for Appellant
133 S. 11th St., Suite 350
St. Louis, Missouri 63102
Ph.: (314) 621-3743
Fax: (314) 231-9552